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## Trial

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, New York, N.Y.  
v. 07 Cr. 1170 (LAP)  
JOSEPH P. COLLINS,  
Defendant.

Before:

HON. LORETTA A. PRESKA,

## APPEARANCES

PREET BHARARA

United States Attorney for the  
Southern District of New York

BY: HARRY A. CHERNOFF

MICHAEL A. LEVY

EDWARD A. IMPERATORE

Assistant United States Attorneys

COOLEY LLP

Attorneys for Defendant

BY: WILLIAM SCHWARTZ

JONATHAN BACH

LAUREN GERBER LEE

- also present -

Gary Smith, Paralegal, U.S. Attorney's Office  
Stephanie O'Connor, Consultant with defense

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(Trial resumed; jury not present)

THE COURT: I hear you have something you want to talk about.

MR. BACH: There is an issue, Judge, that we want to raise. I've given the government the option of raising it either now or after Mr. Westra's direct testimony. It is an issue that potentially could come up on the cross of Mr. Westra. It is up to the government, but I don't want to speak for them.

MR. CHERNOFF: Judge, we will proceed at the Court's pleasure, that Mr. Westra's direct is not going to be more than 30 minutes so we might as well do it now.

THE COURT: OK. What is up?

MR. BACH: The government has indicated that it wants to call a witness from the Wilmer Cutler law firm to testify about conversations with Dennis Klejna. Those conversations are on the subject matter of the Sedona investigation. That's the investigation in which Mr. Maggio was a witness who claims --

THE COURT: This is the, "They're going to throw me under the bus"?

MR. BACH: That's right. So they don't want to have -- and I don't -- they've shown us some 3500 material and we've been discussing it, but essentially they want to establish, as I understand it, two things. Number one, that in

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1       2003, Wilmer Cutler advised Refco that it would represent the  
2 company but wanted to have individuals retain separate counsel.  
3 We have no quarrel with that. We don't think that is in  
4 dispute in this case. We think there is already not only  
5 Mr. Maggio's testimony on that issue but there is documentary  
6 evidence, including Joe Collins' time records, to show that  
7 those are the dates on which those types of conversations  
8 occurred on that very subject matter.

9                 The government seems with this witness to want to go  
10 beyond that and elicit Wilmer Cutler's expert opinion that the  
11 individuals had to have separate counsel, and implying, or at  
12 least creating the situation in which the jury could infer that  
13 the way Mayer Brown did it, by ignoring a potential conflict of  
14 interest, was improper.

15                 And we think, number one, these conversations with  
16 Mr. Klejna, which were not with Mr. Maggio or Mr. Collins, are  
17 pure hearsay. We think, number two, that they are irrelevant.  
18 They are after the fact. They occur after there have already  
19 been discussions with Mr. Maggio about the issue of separate  
20 counsel. They occur after Refco gets back to Dennis Klejna and  
21 says we don't want to proceed with separate counsel for the  
22 individuals. And this appears to be a phone call in which  
23 Mr. Klejna asks Wilmer Cutler if they will stay on as secondary  
24 counsel after Mayer Brown comes in to take the lead role. And  
25 Wilmer says, you know, we're just not comfortable doing that,

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1 we don't want to be secondary counsel, and we don't like the  
2 idea of representing individuals when we're also representing a  
3 company and have to do what's in the company's best interest.

4 We think those conversations are beyond anything of  
5 relevance to this case. They are hearsay. They don't involve  
6 communications directly with Collins, directly with Maggio.  
7 They are on a collateral issue in this case. And they go into  
8 the territory of state of mind, lawyer expert opinion testimony  
9 that we've all made efforts here to minimize and avoid, and  
10 they raise 403.

11 THE COURT: OK.

12 MR. CHERNOFF: Your Honor, first of all, this issue  
13 has nothing to do with Mr. Westra, and I don't know why we are  
14 taking it up now. The defense cannot cross-examine Mr. Westra  
15 on what hearsay information he may have heard about the Sedona  
16 matter in doing the legal due diligence on this deal. That  
17 being said, I am going to try to be brief because I think we  
18 can take this up further later.

19 The Wilmer Cutler firm withdrew from the case because  
20 it would not represent both the company and the individuals.  
21 That was Mr. Maggio's testimony. It was offered for the  
22 purpose of showing that when Joe Collins knew that another law  
23 firm withdrew from the representation in the Sedona matter, he  
24 said to Mr. Maggio: We'll get through this together. I'll  
25 represent both you and the company, assuming that Mr. Bennett

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1       wants me to. And that's what Mr. Bennett wanted.

2                  We are not offering expert opinion as to why Wilmer  
3 made that decision, and we could even have an instruction that  
4 one law firm's decision -- well, we could try to fashion an  
5 instruction that addresses some of the defense's concern. But  
6 the reality is that Mr. Maggio's credibility was attacked  
7 severely. On this very point, I remember Mr. Schwartz reading  
8 Mr. Bach's cross and saying, And on this we only have your good  
9 word, sir. And, as your Honor I think will recall, Mr. Maggio  
10 said, no, I recall someone from Wilmer Cutler. Which is what  
11 we propose to do.

12                 THE COURT: Can I just interrupt you for one minute?

13                 Did you just tell me you have 30 more minutes with  
14 Mr. Westra, about?

15                 MR. CHERNOFF: Yes, your Honor.

16                 THE COURT: How much cross for Mr. Westra?

17                 MR. BACH: About 45 minutes.

18                 THE COURT: I'm only trying to figure out if we should  
19 be talking about this now on jury time or whether we can defer  
20 it.

21                 MR. BACH: Well, it is going to come up in the cross  
22 of Mr. Westra. So if you want to -- if the Court wants to  
23 discuss it after the direct, that is fine with us.

24                 THE COURT: Fine. Well, there is no point in taking  
25 another break.

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1           I'm sorry. Go ahead.

2           MR. CHERNOFF: Again, we have no idea how Mr. Westra  
3 could be cross-examined on why Wilmer Cutler withdrew from the  
4 representation of Mr. Maggio.

5           But in any case, we have offered, because we are  
6 certainly interested in resting, getting the case in, we've  
7 offered a stipulation to minimize whatever confusion Mr. Bach  
8 thinks would result from lengthy testimony from a Wilmer Cutler  
9 lawyer, but the reality is that it was not the case that Wilmer  
10 said, hey, let's all get some other lawyers to help out and  
11 we'll all go forward on the same team. Wilmer said to  
12 Mr. Maggio you've got to get your own lawyer. They said that  
13 through Mr. Klejna, and Mr. Maggio had the reaction that was  
14 the subject of his testimony.

15           MR. BACH: Judge, a couple of points.

16           We are happy with a stipulation. I proposed a  
17 stipulation that says Wilmer advised that it would represent  
18 the company and have separate counsel retained to represent the  
19 individuals. The government says -- let me finish,  
20 Mr. Chernoff -- that that simple statement of fact is not  
21 enough, because it wants to prove up a point that goes beyond  
22 that. It wants to bring into evidence the opinion of Wilmer  
23 Cutler that that's the way it had to be and that there was a  
24 genuine conflict of interest here that could not be addressed  
25 any other way. And that's an opinion. It is in the area of

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1 experts, conflicts of interest law --

2 THE COURT: All right. I heard that already.

3 MR. BACH: And, Judge, the Second Circuit has said --  
4 and this is in the Kaizer case that was recently argued -- this  
5 is with respect to advice that an in-house general counsel --  
6 the statement that in-house general counsel made that was  
7 considered hearsay, the Second Circuit overturned in Kaizer in  
8 this situation, where it said that the mere identification of a  
9 relevant nonhearsay use of the evidence is insufficient to  
10 justify its admission if the jury is likely to consider the  
11 statement for the truth of what was stated with significant  
12 result in prejudice.

13 This is the same situation. It is going to be an  
14 in-house conversation with an in-house general counsel. It is  
15 hearsay.

16 Whatever Wilmer said to Mr. Klejna, if it was not --  
17 you know, if Mr. Klejna, it would be one thing if he were to  
18 testify about what he said to Mr. Maggio or what was  
19 communicated to Mr. Collins, but instead they are proposing to  
20 have Wilmer --

21 THE COURT: Got it. How is it come in? What is the  
22 hearsay exception? Wilmer is going to say -- or Wilmer is  
23 going to say we said -- we, Wilmer, said --

24 MR. BACH: That Klejna --

25 MR. CHERNOFF: That they told Mr. Klejna that they

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1 would not represent the company and the individuals.

2 THE COURT: So that is not hearsay, right, Mr. Bach?

3 MR. BACH: Yes, it is, Judge.

4 THE COURT: I, Wilmer, told Klejna.

5 MR. BACH: It's Wilmer's out of court statement to  
6 Mr. Klejna.

7 THE COURT: No. It is the speaker's statement.

8 MR. CHERNOFF: It is not offered for the truth of  
9 what -- there is no truth in that statement. It is saying this  
10 is what we're going to do. This is what we are doing. And  
11 that is in fact what they did do, and it was communicated to  
12 Mr. Maggio.

13 MR. BACH: First of all, Judge, a speaker can't offer  
14 the speaker's own statement.

15 But, secondly, Ms. Avakian, as I understand, a former  
16 partner of Wilmer, is going to testify to things that other  
17 partners at her law firm said. She was not the speaker at the  
18 time. She is going to be testifying to what Bill McLucas said  
19 or Andrew Kaizer said, and she is going to be relating  
20 conversations, the statements made by other speakers to Dennis  
21 Klejna, and there is no connection -- there is no proof that  
22 Klejna related any of this to either Mr. Collins or to  
23 Mr. Maggio.

24 Now, as the Court knows, when there is a retention of  
25 a new law firm, it is a delicate situation for the general

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1 counsel. And you say some things to the departing law firm and  
2 you say some different things to the incoming law firm, and you  
3 try to make everyone happy and suggest that there is no rifts  
4 or issues and that there are good reasons that everyone is  
5 right.

6 THE COURT: Mr. Bach, let's move this along. You  
7 people call me at 10 o'clock and you say there is a problem. I  
8 don't understand why you have to wait until we are on jury time  
9 for these things.

10 MR. BACH: I apologize, Judge. We have --

11 THE COURT: I don't care.

12 MR. BACH: We have been raising this issue with the  
13 government --

14 THE COURT: Come on. Let's go. Next.

15 Mr. Chernoff, Mr. Bach says that it is not the speaker  
16 who is going to testify.

17 MR. CHERNOFF: Your Honor, there were three partners  
18 of the firm on the phone with Mr. Klejna. I can't imagine  
19 Mr. Bach is proposing that we should call all three to say what  
20 each one of them said in the course of this conversation. They  
21 were all present for the conversation. The Wilmer firm  
22 presented a unified front in telling Mr. Klejna this is what's  
23 happening. We are not getting into the nitty-gritty of who  
24 said what in the course of that conversation. I'm sure no one  
25 remembers the exact details.

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1           We produced to the defense the 3500 that reflects  
2 everything that was said. Ms. Avakian was the primary note  
3 taker of the conversations and is the most competent to talk  
4 about these things, especially to the extent that anyone's  
5 recollection would fail. And, again, we've offered a  
6 stipulation as to what the Wilmer firm would have said, but  
7 Mr. Bach, as he just read to the Court, is proposing one that  
8 suggests that the Wilmer firm was going to retain lawyers for  
9 Mr. Maggio and some other individual, and that, of course, is  
10 not permitted.

11           MR. BACH: They advised that the individuals retain  
12 separate counsel. That is what happened here.

13           Ms. Avakian is a very, very good note taker and she  
14 identified each speaker who speaks on the call and she is not  
15 the speaker --

16           THE COURT: Do I have those notes?

17           MR. BACH: I will hand them right up.

18           And "ADK" is Andrew Kaiser.

19           Judge, you will see that these notes occur after the  
20 fact, after the communication has been made with Mr. Maggio,  
21 after the decision has been made by Refco to have Mayer Brown  
22 come on board. These are conversations about whether Wilmer  
23 will stay on even after those decisions --

24           THE COURT: But that's what the government wants to  
25 put in. What do you care?

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1                   MR. BACH: Because those don't relate to Wilmer saying  
2 to Mr. Maggio, in the first instance, you need separate  
3 counsel. This is --

4                   THE COURT: What is it that the government is seeking  
5 to elicit from this conversation?

6                   MR. CHERNOFF: Again, not a hearsay statement, not  
7 offered for the truth. We are seeking to elicit that Wilmer  
8 told the Refco company, through its general counsel, that the  
9 Wilmer firm would not represent both the company and the two  
10 individuals who were the subjects or targets of the Sedona  
11 investigation.

12                  We are offering that solely to corroborate that  
13 Mr. Klejna then related that to Mr. Maggio, who had the  
14 reactions that were set forth in his testimony, and discussing  
15 that with Mr. Bennett and then ultimately coming to  
16 Mr. Collins. It is offered for the purpose of showing not that  
17 Mr. Collins committed a crime but that Mr. Collins was aware  
18 from Mr. Maggio -- and this is already in the record -- that  
19 Mr. Maggio told Mr. Collins, hey, Wilmer won't represent us  
20 both, and, as he said, Joe said we'll get through this  
21 together.

22                  MR. BACH: It is the "would," Judge, that we object  
23 to. They want to bring in that Wilmer is saying we would not  
24 do that.

25                  THE COURT: Why can't -- I know that that's what you

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1 don't want. The question is what is your principal reason for  
2 objecting?

3 MR. SCHWARTZ: Your Honor, they didn't say it to  
4 Mr. Collins. They didn't -- they are not going to say they  
5 said it to Mr. Maggio. He assumes -- the assumption here is  
6 that it is communicated to Mr. Collins; that was Mr. Chernoff's  
7 assumption. It is hearsay. They are offering it for the  
8 truth, that they wouldn't.

9 The fact that it is said to Klejna has no relevance  
10 here -- none. And it's highly prejudicial, given the fact that  
11 Mayer Brown represented them, and it is very confusing because  
12 different lawyers can disagree about --

13 THE COURT: I thought the probative value was in  
14 corroborating what Maggio said later on.

15 MR. SCHWARTZ: But Maggio -- but this conversation  
16 takes place after Maggio has been told this and it doesn't take  
17 place with Joe Collins.

18 THE COURT: But it still corroborates what he's  
19 saying.

20 MR. SCHWARTZ: No, it doesn't. What he says is they  
21 are going to throw me under the bus. That is a lot different.  
22 They are not saying he said it. Wilmer isn't saying Maggio is  
23 guilty, he's got to get his own lawyer. What Wilmer is saying  
24 here is very confusing to the jury, and would be very confusing  
25 to the jury, is that there are firms that will not represent

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1 both companies and individuals and there are firms that will.

2 Without -- until they find that there is a conflict, and that's  
3 just way beyond the scope of what this trial is about.

4 MR. BACH: In terms of what it corroborates, there is  
5 no dispute that this decision was made in 2003, that Mayer  
6 Brown came in in 2003, that there were discussions about how  
7 Mr. Maggio needed individual counsel, there is no dispute about  
8 that. The only dispute is whether in that context Mr. Maggio  
9 said to Mr. Collins this is a house of mirrors and I'm going to  
10 let it all out.

11 The background facts are not in dispute. And, in  
12 fact, there is already corroborating evidence in the record,  
13 documents, that in 2003 all of this happened. So this would  
14 be -- if that's what the government wanted this for, it would  
15 be surplusage on an undisputed point.

16 What goes beyond that here, the only new fact they are  
17 seeking to introduce, is that Wilmer was of the view that this  
18 had to be done. And we will stipulate that it was in 2003 --

19 THE COURT: I know.

20 MR. BACH: -- that Maggio was advised and that  
21 corroborates it.

22 THE COURT: Where are the note of whatever it is the  
23 government wants to elicit, please?

24 MR. CHERNOFF: I'm sorry, your Honor.

25 (Pause)

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1                   Your Honor, the notes are from a couple different  
2 lawyers, and as Mr. Bach points out, these notes relate to a  
3 follow-up conversation with Mr. Klejna. These are the notes  
4 that the Wilmer firm has. I don't think they are notes on the  
5 first call -- presumably, there were a number of calls about  
6 this, but the first call where the advice is given to  
7 Mr. Klejna are not in these notes. I think these notes  
8 reflect, as I understand it, what Mr. Klejna learned, what  
9 Mr. Klejna discussed when he called back to try to talk Wilmer  
10 into doing this.

11                  THE COURT: I see. Forgive me for being slow on this,  
12 Mr. Chernoff, the probative value is?

13                  MR. CHERNOFF: The probative value is just that  
14 Mr. Maggio was told he'd have to get his own lawyer, not that  
15 Wilmer said maybe you should or maybe we'll help you. He was  
16 told you have to get your own lawyer. As he perceived it, he  
17 was being cut loose.

18                  The defense attacked Mr. Maggio's credibility on that  
19 and many other issues, and we are just corroborating that  
20 Wilmer did tell the firm -- did tell Refco that they would not  
21 do the representation under those circumstances.

22                  Now, I told the defense we'll take a stipulation that  
23 says they could not or they would not. It seems like they  
24 would prefer "would not," and that is fine with us. We are not  
25 asking for Wilmer's expert opinions to be adopted. But the

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1 fact is that Mr. Collins knew, because Mr. Maggio told him,  
2 that Wilmer would not represent both he -- both him and the  
3 company. And that is what we are trying to corroborate, that  
4 Mr. Maggio was truthful when he testified that way, and  
5 Mr. Collins' state of mind when he said we'll get through this  
6 together was that he knew that another law firm, which I assume  
7 is unknown to the jury, their expertise, their  
8 professionalism -- none of that we have asked for in the  
9 stipulation -- another law firm said we're not going to do it  
10 this way.

11 MR. SCHWARTZ: The fact is it doesn't prove that  
12 that's what Wilmer told Maggio; it proves that's what Wilmer  
13 told Klejna.

14 MR. CHERNOFF: That is just the weight of the  
15 evidence. That is really a silly argument at this point.

16 MR. SCHWARTZ: Mr. Chernoff, let me finish.

17 We don't dispute that Mr. Maggio believes he was told  
18 that he had to get new counsel.

19 THE COURT: What's wrong with the "would not"  
20 stipulation?

21 MR. SCHWARTZ: It implies -- it implies that there is  
22 an ethical problem. That is problem.

23 THE COURT: "Could not."

24 MR. SCHWARTZ: Also "could not" implies that it is  
25 unethical.

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1                   THE COURT: Right. But that's why I asked you about  
2 "would not." You just said -- Mr. Bach just said -- I'm sorry  
3 for interrupting you, but some law firms will represent --

4                   MR. SCHWARTZ: You are certainly entitled.

5                   THE COURT: -- companies and individuals and some  
6 won't. This is a would not. What's wrong with would not?  
7 It's just what Mr. Bach said.

8                   MR. BACH: Because I don't -- would not implies that  
9 they are taking a stand, that it's a matter of principle,  
10 and --

11                  THE COURT: Well, it's just what you said.

12                  MR. SCHWARTZ: No, but they --

13                  THE COURT: Some law firms will and some law firms  
14 won't. This is a won't.

15                  MR. SCHWARTZ: But the jury doesn't know that, your  
16 Honor. And would not implies -- and this is Wilmer's position,  
17 but it doesn't -- it reflects on Mayer Brown in a way that  
18 Mayer Brown is prepared to do something that this other firm  
19 finds a little sketchy. That's what is implied here. And  
20 that's an unfair inference to be drawn from this testimony.

21                  If what they want is us to stipulate that Maggio was  
22 told he had to get separate counsel by Wilmer -- are we  
23 prepared to stipulate to that?

24                  MR. BACH: I --

25                  MR. SCHWARTZ: They are not going to say that. How

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1 can we stipulate to that? They are not even going to say that.

2 MR. BACH: Their own witness is not going to say that.  
3 They don't know what Maggio was told. They could have called  
4 Mr. Klejna and ask Mr. Klejna what did you tell Mr. Maggio  
5 based on your conversations at Wilmer Cutler.

6 MR. SCHWARTZ: That is how you corroborate it.

7 MR. BACH: They couldn't object, and that would be  
8 direct corroboration.

9 This is hearsay. I won't bore the Court because I've  
10 already said that. But if the Court were to instruct the jury  
11 that law firms handle this different ways; there are some law  
12 firms that only represent the entities and that's their modus  
13 operandi, and we can put all of this in context for the jury,  
14 either through an instruction or through an expert, and explain  
15 how different law firms handle that, because we can't do that.  
16 For them to -- if this is an issue that kind of hangs --

17 THE COURT: Yes, but does it really matter why. Their  
18 point, the only relevant point, is that the Wilmer Cutler firm  
19 declined to do this, right? That's the only point.

20 MR. BACH: Judge --

21 THE COURT: They refused.

22 MR. BACH: But I don't think -- I don't think the  
23 conversations reach that kind of point until much later in the  
24 game. I think what happened is -- and, you know, I work in  
25 this area. You know, people, lawyers, they said this is how we

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1 would approach this case. We are not going to represent  
2 individuals --

3 THE COURT: The company and the individuals; that's  
4 what I said five minutes ago.

5 MR. BACH: There is no -- by the way, there is no  
6 suggestion that there is any particular conduct by Maggio that  
7 merits this approach. It is simply this is how Wilmer wants to  
8 approach this situation.

9 And it might be that, you know, and that's -- and so  
10 there is conversation about this is how we plan to do it, and  
11 that is communicated --

12 THE COURT: I think that is not strong enough,  
13 Mr. Bach, from what I understand of the facts here. It is not  
14 this is how we plan, this is how we're going to do it, because  
15 we're not going to do it the other way.

16 MR. CHERNOFF: And, your Honor, Mr. Bach now seems to  
17 want to have a minitrial on this where we call Mr. Klejna, we  
18 call everyone that was involved. But I assure Mr. Bach that if  
19 the Wilmer firm were called, they would testify they would not  
20 say that there was no conduct that they learned of that  
21 affected their decision. We all know that the way they made  
22 that decision was to interview Mr. Maggio and then made a  
23 determination based on what his interests were vis-a-vis the  
24 primary client, the company.

25 MR. SCHWARTZ: We're not saying we're asking for a

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1 minitrial. There is a competent witness out there that can  
2 give them the corroboration they want and they can call him.

3 MR. CHERNOFF: Mr. Schwartz is saying that he thinks  
4 Mr. Klejna would be a better witness than Ms. Avakian. It is  
5 my decision to call Ms. Avakian. Whether Mr. Klejna would be a  
6 better witness or not, we think that Ms. Avakian is certainly  
7 competent and sufficient to demonstrate that the information  
8 that was communicated to Mr. Klejna in light of Mr. Maggio's  
9 testimony made its way to Mr. Maggio.

10 MR. SCHWARTZ: There are only two witnesses who are  
11 competent to testify about what Mr. Klejna told Mr. Maggio.  
12 One of them is no longer with us; one of them is. They are  
13 calling a third witness.

14 THE COURT: The question is why can't they? Then they  
15 have to argue to the jury that what this lawyer says was told  
16 to Klejna is in fact what Klejna told Maggio. That's their  
17 problem.

18 MR. SCHWARTZ: What this lawyer said to Klejna after  
19 Maggio was told this doesn't prove that Maggio was told this.  
20 It's not we're going to tell Klejna this and then he is going  
21 to tell Maggio. It's Maggio has been told this and now we're  
22 telling Klejna this. It doesn't connect.

23 THE COURT: What about that?

24 MR. CHERNOFF: Your Honor, Mr. Schwartz again is just  
25 talking about the 3500 now, which does relate to a subsequent

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1 conversation. That doesn't mean -- as we all understand,  
2 before that conversation took place, before those notes were  
3 written, Mr. Klejna was told that Wilmer would not do this  
4 representation.

5 THE COURT: Prior to the Klejna/Maggio conversation?

6 MR. CHERNOFF: Yes. And so the fact that there are  
7 not notes of that at this time --

8 THE COURT: All right. I got that part. Tell me one  
9 more time why is this not hearsay?

10 MR. CHERNOFF: It's not offered for the truth of  
11 anything. It is just offered as Wilmer is telling Refco we're  
12 not going to do this. This is how -- this is what we're doing.  
13 This is the act that we are talking.

14 We're not asking for any details of the conversation  
15 about what was said or why it was said. We're just saying -- I  
16 mean, I think it couldn't be more straightforward. Refco,  
17 Wilmer is not going to represent the company in this way.  
18 There can be no question that that was actually what they were  
19 saying. There is no cross-examination as to whether that was  
20 true, whether they really were going to represent the company  
21 and Mr. Maggio. So I just don't know how the hearsay objection  
22 can be made.

23 MR. SCHWARTZ: The fact that something may be true  
24 doesn't mean that you can put in a statement for that truth.  
25 That doesn't get over the hearsay rule. The fact that it

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1 really is true is not an exception to the hearsay rule.

2 MR. CHERNOFF: Your Honor, again, it was said as a  
3 directive. It wasn't said as material that is subject to  
4 cross-examination as to whether it was true. It was said that  
5 this is what the Wilmer firm is doing.

6 THE COURT: All right. I will permit it. I see the  
7 probative value of it in corroborating Maggio. I do not see  
8 the unfair prejudice in that, as Mr. Bach has told us, there is  
9 already evidence of this in the record both from the Maggio  
10 testimony and the documentary evidence that Mr. Bach referred  
11 to.

12 Now, do we have any issues about the cross-examination  
13 of Mr. Westra in light of this?

14 MR. SCHWARTZ: Your Honor, before we --

15 THE COURT: Did I understand that --

16 MR. SCHWARTZ: Before you move on to Mr. Westra, we  
17 would request from the Court an instruction that the evidence  
18 is not being offered for the truth of the matter asserted and  
19 that the jury should not speculate on the reasons that those  
20 things were said.

21 THE COURT: Any objection to that?

22 MR. CHERNOFF: Well, I think the first part is kind of  
23 a legalism that the jury will have no idea what it means.

24 THE COURT: We tell them that all the time.

25 MR. CHERNOFF: I understand. I just feel like in this

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Trial

1 case where the statement is clearly not being offered for the  
2 truth, well --

3 THE COURT: Is there any reason not to say it is not  
4 being offered for the truth, only for the fact that the  
5 statement was made?

6 MR. CHERNOFF: That's fine, your Honor.

7 THE COURT: All right.

8 MR. SCHWARTZ: And that the jury not speculate as to  
9 why Wilmer made the statement.

10 THE COURT: I'm not sure we need that. I mean, they  
11 shouldn't be speculating about anything, for that matter.

12 What about Westra?

13 MR. BACH: Can we talk in camera?

14 THE COURT: What?

15 MR. BACH: It has to do with my cross-examination. I  
16 would rather not disclose it in advance to the government.

17 THE COURT: It's now 10:32, but OK. I don't  
18 understand why this is done on jury time.

19 MR. CHERNOFF: Your Honor, could we do this after the  
20 direct, because --

21 THE COURT: Sure. Let's do it after the direct.

22 MR. CHERNOFF: OK.

23 (Continued on next page)

Capdcol1

Trial

1 (Jury present)

2 THE COURT: Welcome back. I hope you had a nice day  
3 yesterday.

4 Won't you be seated.

5 MR. CHERNOFF: Your Honor, the government recalls  
6 James Westra.

7 THE COURT: Good morning. Thank you.

8 I remind you, you are still under oath.

9 THE WITNESS: Thank you.

10 JAMES WESTRA,

11 Resumed, and testified further as follows:

12 THE COURT: We continue with the direct examination of  
13 Mr. Westra.

14 MR. CHERNOFF: Thank you, your Honor.

15 THE COURT: Mr. Chernoff.

16 DIRECT EXAMINATION (Resumed)

17 BY MR. CHERNOFF:

18 Q. Mr. Westra, when we broke at the end of the day Tuesday, we  
19 were looking at sections of the Equity Purchase and Merger  
20 Agreement, Government Exhibit 1005.1, and I think there is  
21 still a stack of documents before you. Can you find that one,  
22 that 1005.1?

23 A. I have it. Thank you.

24 Q. OK. And let's pick up, if we may, with page 7. You'll see  
25 Section 3.3, "Capitalization of the Company."

Capdcol1

Westra - direct

1 A. Yes. I have it.

2 Q. And, Mr. Westra, is the language here in this section that  
3 your client Thomas H. Lee wanted in this agreement, the EPMA?

4 A. Yes.

5 Q. What did they want to accomplish by asking for this  
6 language?

7 A. They wanted to know --

8 MR. BACH: Objection.

9 THE COURT: Mr. Chernoff.

10 MR. CHERNOFF: I thought this was the same series of  
11 objections we had the last time. I am asking for the witness  
12 to explain why he, representing this client, sought the  
13 language in the document he negotiated.

14 THE COURT: Overruled.

15 You may answer, sir. Do you need the question again?

16 THE WITNESS: No, your Honor, I don't.

17 A. Our client wanted this language because they wanted to know  
18 how many shares were outstanding or in this case membership  
19 interests in the company and who owned them.

20 Q. And why was that important to you and your client in  
21 negotiating this agreement, this contract?

22 A. It was important because we wanted to make certain that the  
23 company was owned by those whom we had been told it was owned  
24 by, and, also, we wanted to make certain that the purchase  
25 price was paid to the right people, and we wanted to know that

Capdcol1

Westra - direct

1 others did not have an interest in the company.

2 Q. And I see, looking in the middle of this Section 3.3, there  
3 is some language that says there are no outstanding  
4 subscriptions, options, warrants, calls, commitments or any  
5 other agreements of any character obligating the company or any  
6 subsidiary to issue any equity interests at any time or under  
7 any circumstance, including conversion of debt into equity and  
8 including any rights to receive securities in any public  
9 offering by the company or its successors, except as disclosed  
10 in Schedule 3.3.

11           And why was Thomas H. Lee interested in particular  
12 about options, to pick some of the words that are in this  
13 section, options that would give another party the right to  
14 obtain equity interests at any time under any circumstance?

15           MR. BACH: The same objection.

16           THE COURT: The same ruling.

17           You may answer, sir.

18 A. The Lee company was interested in knowing that because  
19 again they wanted to know who owned the company and they wanted  
20 to make certain that they were dealing with the people who had  
21 the ownership interest in the company and that no other people  
22 had the right to acquire interest in the future.

23 Q. Mr. Westra, let me ask you to turn ahead in the EPMA to  
24 page 12, where you will find Section 3.15, "Material  
25 Contracts."

Capdcol1

Westra - direct

1 A. Yes, I have it.

2 Q. Is this language that your client Thomas H. Lee sought to  
3 be included in this EPMA contract?

4 A. Yes.

5 Q. And we see here that "Material Contracts" says except as  
6 set forth in a related schedule, "Neither the company nor any  
7 subsidiary is a party to not bound by any," and there is a few  
8 subparagraphs there.

9 I will ask you to flip the page, to subparagraph Roman  
10 Numeral 6. It says, "Agreement which contains restrictions  
11 with respect to payment of any distribution in respect of the  
12 membership interests."

13 Let me stop you there and ask why you sought that  
14 language for Thomas H. Lee?

15 A. We sought that --

16 MR. BACH: Objection.

17 THE COURT: The same answer.

18 You may answer, sir.

19 A. We sought that because, again, we wanted to make certain  
20 that we were dealing with the people that owned the entity and  
21 that the purchase price was being paid to the people who in  
22 fact were the owners of company.

23 Q. Dropping down the page a little bit to Roman Numeral 9, it  
24 says, "Any contract, arrangement or understanding that relates  
25 to the future disposition or acquisition of material assets or

Capdcol1

Westra - direct

1 properties, or any merger or business combination."

2 And, again, why did you seek that language on behalf  
3 of your client Thomas H. Lee?

4 MR. BACH: I object.

5 THE COURT: The same answer. Overruled.

6 You may answer.

7 A. We looked for that language because in determining if we  
8 wanted to acquire the company, we wanted to make certain that  
9 if there was any other contract with a third party which gave  
10 them any restrictions, consent rights over that acquisition,  
11 that we were aware of that.

12 Q. And this section, 3.5, provides for schedules for such  
13 contracts to be disclosed on?

14 A. Yes, it does.

15 Q. On that schedule or at any time, was an interest by a  
16 company called DF Capital disclosed?

17 A. No.

18 Q. Let me ask you now to turn to page 10 of this document.  
19 Section 3.12.

20 A. I have it.

21 Q. And it says: "Interests of Officers and Directors. Except  
22 as Set Forth on Schedule 3.12, since March 1, 2003, no officer,  
23 manager, director, or member of the company or any subsidiary,  
24 or any affiliate of any such officer, director, member or other  
25 equity holder, has had, either directly or indirectly, a

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Westra - direct

1 material interest in any contract or agreement to which the  
2 company or any subsidiary is a party or by which any of their  
3 properties or assets may be bound or affected, except for  
4 employment contracts entered into on an arm's-length basis."

5 Mr. Westra, the same question. Is this language that  
6 you sought on behalf of your client Thomas H. Lee?

7 A. Yes.

8 Q. Why was that important to Thomas H. Lee?

9 MR. BACH: The same objection.

10 THE COURT: The same answer.

11 Overruled.

12 A. This goes back to the discussion we had in my testimony two  
13 days ago in which you asked about related-party transactions,  
14 and as I testified in response to that question, it's important  
15 for the buyer to know if there are --

16 MR. BACH: Objection.

17 THE COURT: Are you talking about in this case, sir?

18 THE WITNESS: Yes, your Honor. I am.

19 THE COURT: Go ahead.

20 A. It was important for the buyer in this case to know if  
21 there were any contracts with officers, directors,  
22 shareholders, because if there were, we needed to determine  
23 what those contracts were, whether they had any effect on the  
24 financial condition or operations of the company, and whether  
25 we wish those to continue after closing.

Capdcol1

Westra - direct

1 Q. And when it says "the company" here, that's Refco, the  
2 Refco Group, correct?

3 A. That is correct.

4 Q. Were the officers of the company considered -- of Refco  
5 considered related parties with respect to the company?

6 A. Yes.

7 Q. And what about RGHI, the holding company that owned Refco,  
8 was that viewed as a related party?

9 A. It was -- we had understood it was a 90 percent  
10 stockholder, so, yes, it would have been.

11 Q. And before Refco collapsed, were you ever made aware that  
12 the company, Refco, had the practice of indemnifying,  
13 recovering any losses of third parties resulting from loans  
14 that the third parties had made to RGHI?

15 A. No.

16 Q. Were any such indemnifications disclosed on Schedule 3.12  
17 that relates to the section we just looked at?

18 A. No.

19 MR. CHERNOFF: Mr. Smith, if we could bring up the  
20 first page, Government Exhibit 1504, which is in evidence.

21 Q. Mr. Westra, the document that is up on the screen is the  
22 "Acquisition of Rights to Participate in Proceeds of Sale  
23 Between Refco Group Limited, LLC and DF Capital Inc.," which  
24 I'll sometimes refer to as the Proceeds Participation  
25 Agreement.

Capdcol1

Westra - direct

1                   Have you seen this before, sir?

2 A. Yes.

3 Q. When was the first time you saw this document?

4 A. I don't recall the exact date, but it was following the  
5 collapse of Refco in connection with some of the inquiries or  
6 depositions that occurred thereafter.

7 Q. And was -- prior to the collapse of Refco or at any time,  
8 actually, did Mr. Collins ever disclose this document to you?

9 A. No.

10 Q. Before Refco's collapse, had you ever heard of a company  
11 called DF Capital?

12 A. No.

13 Q. Before Refco's collapse, did you know that any kind of  
14 BAWAG-controlled entity had a right to share in the proceeds of  
15 the sale of Refco?

16 A. Well, I knew that BAWAG was a 10 percent shareholder and  
17 that it had a right to participate with respect to that  
18 10 percent, but I did not know that any other entity associated  
19 with BAWAG had a right to participate, no.

20 Q. And without getting into the details of the document, does  
21 this Proceeds Participation Agreement concern such additional  
22 rights by a BAWAG-controlled entity?

23 A. Yes.

24 Q. When you learned that there was an agreement that Refco had  
25 with a BAWAG entity, DF Capital, called either the acquisition

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Westra - direct

1 of rights to participate in the proceeds of sale -- well, let  
2 me withdraw that.

3 When you -- this is a document you saw in connection  
4 with interaction with the bankruptcy, is that not correct?

5 A. Yes.

6 Q. Have you also heard it called Proceeds Participation  
7 Agreement?

8 A. Yes.

9 Q. That term, Proceeds Participation Agreement, does it have  
10 any kind of particular meaning in contracts or the business  
11 world? Does it tell you what that agreement is?

12 A. The name is descriptive. Other than that, no. It's not  
13 something which I have typically seen in contracts.

14 Q. Do you recall ever having an agreement, working on an  
15 agreement that was called a proceeds participation agreement?

16 MR. BACH: Objection.

17 THE COURT: Basis, please? It is a do you recall  
18 working on.

19 MR. BACH: It goes to his general experience outside  
20 this case.

21 THE COURT: I thought it was with respect to this case  
22 because counsel named the Proceeds Participation Agreement.

23 MR. BACH: No objection then.

24 MR. CHERNOFF: Your Honor, I am asking for the  
25 witness' state of mind when he learned there was something

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Westra - direct

1 called a proceeds participation agreement.

2 THE COURT: In this case?

3 MR. CHERNOFF: Yes.

4 THE COURT: In this case, Mr. Bach.

5 MR. CHERNOFF: And so I am just asking whether he ever  
6 heard that term before or worked on such an agreement before.

7 MR. BACH: In any other matters.

8 THE COURT: That is not -- the question reads:

9 "Q Do you recall ever having an agreement, working on an  
10 agreement that was called a proceeds participation agreement?"

11 Mr. Chernoff says he's asking the question with  
12 respect to this matter.

13 MR. CHERNOFF: Although, your Honor, I would also like  
14 to next ask with respect to any matter, just to get the  
15 witness' state of mind with reference to that term.

16 THE COURT: Let's answer this question.

17 Sir, are you able to answer the question with respect  
18 to this matter? That is, do you recall working on an agreement  
19 that was called a Proceeds Participation Agreement?

20 THE WITNESS: With respect to this transaction?

21 THE COURT: Yes, sir.

22 THE WITNESS: No, we did not.

23 MR. CHERNOFF: Your Honor, if I may ask the next  
24 question?

25 BY MR. CHERNOFF:

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Westra - direct

1 Q. Had you ever worked on something call a proceeds  
2 participation agreement in other transactions?

3 MR. BACH: Objection.

4 THE COURT: The basis of the objection is?

5 MR. BACH: Relevance.

6 THE COURT: Mr. Chernoff.

7 MR. CHERNOFF: Maybe we should go to the sidebar, your  
8 Honor. I'm sorry. I don't want to --

9 THE COURT: Mr. Reporter, if you would.

10 (Continued on next page)

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Capdcol1

Westra - direct

1 (At the sidebar)

2 MR. CHERNOFF: Your Honor, I believe the witness will  
3 answer that he had never worked on something called a proceeds  
4 participation agreement. There has already been  
5 cross-examination in this case that the document which we will  
6 be offering next, which is a February draft by an associate  
7 working in the data room, made reference to a copy of a  
8 Proceeds Participation Agreement. The defense will try to  
9 assert, as they did with Mr. Schoen, I believe, and maybe other  
10 witnesses, that this witness actually knew about the Proceeds  
11 Participation Agreement and considered it a, quote, minor point  
12 to keep track of. I think that might have even been the  
13 defense opening statement.

14 So my question is simply to establish a basis that  
15 even if the witness had seen this agreement, this term meant  
16 nothing to him. It did not disclose in and of itself that this  
17 was a material contract.

18 MR. BACH: Is the witness going to say that he saw  
19 this document and the reference?

20 MR. CHERNOFF: No.

21 MR. BACH: Then how is this relevant?

22 MR. CHERNOFF: Because you are going to try to suggest  
23 that he is not testifying truthfully and he did see the  
24 document because Weil had an interest in and, as you're going  
25 to assert on cross-examination, and in the next witness, that

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Westra - direct

1 Weil had an interest in fudging what happened here because of  
2 their concerns about liability for themselves and their client.

3 MR. SCHWARTZ: I don't see how the fact that that he  
4 has never worked on a proceeds participation agreement goes to  
5 the weight of them deciding that they don't want to ask for it.  
6 The fact that he has never personally worked on a proceeds  
7 participation agreement?

8 THE COURT: OK. I'll permit it not to open the  
9 floodgates to what are we doing in all sorts of transactions in  
10 general but because of the particular question here about minor  
11 things to keep track of.

12 MR. CHERNOFF: Thank you, your Honor.

13 (Continued on next page)

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Capdcol1

Westra - direct

1 (In open court)

2 MR. CHERNOFF: Thank you, your Honor.

3 May I have the question read back?

4 THE COURT: Yes, sir. If you will wait for the court  
5 reporter.

6 (Pause)

7 THE COURT: (Reading).

8 "Q Had you ever worked" -- and this is after you answered,  
9 sir, with respect to this matter:

10 "Q Had you ever worked on something called a proceeds  
11 participation agreement in other transactions?"

12 THE WITNESS: May I answer it?

13 THE COURT: Yes, sir.

14 A. To my recollection, no, I have not.

15 BY MR. CHERNOFF:

16 Q. And so upon first hearing that there was something called a  
17 proceeds participation agreement, did that term mean anything  
18 to you just based on the term itself?

19 A. I could only surmise from the title of the agreement that  
20 it related to some sharing of proceeds.

21 Q. Now, you testified yesterday that the due diligence that  
22 Weil, Gotshal performed began sometime prior to the signing of  
23 the Letter of Intent in mid-April?

24 A. Yes.

25 Q. When, approximately, do you recall Weil, Gotshal first

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Westra - direct

beginning its efforts to conduct due diligence?

A. I don't recall the exact date but I believe it was January or February of 2004.

Q. And how did things get started with respect to Weil's role in due diligence at that time?

A. We received a call from our client Thomas H. Lee Company informing us that they were interested in making this acquisition. They asked us to begin our due diligence effort.

We did so by coordinating with the company, with counsel for the company, and with the investment bankers who were running that process to request a variety of documents from them that we could review as part of our diligence.

Q. And I think you said there was a data room established?

A. I don't recall saying that, but I believe there was by the investment banker, yes.

Q. I'm sorry. It seems like a long time since Tuesday.

Let me ask you what a data room is?

A. A data room is a room that is assembled by the company and its advisors. Sometimes it is a physical data room where documents are actually there in hard copy. More often it is an electronic data room. And relevant documents pertaining to the company which is going to be acquired are put or loaded into that data room so that a buyer can have ready access to them to review them as part of the diligence effort.

Q. Mr. Westra, in the Refco deal, do you recall whether there

Capdcol1

Westra - direct

1 was actually a physical data room established somewhere?

2 A. I don't recall if it was physical or online, I can't  
3 recall.

4 Q. And was that something that the investment banker CSFB set  
5 up?

6 A. The investment banker, working with the company, did so.

7 Yes.

8 Q. And did you, as the leader of the Weil, Gotshal team on  
9 this deal, assign associate lawyers to begin to go through the  
10 contents of the data room?

11 A. I don't remember whether I did so or whether my partner Jay  
12 Tabor, working on the transaction did, so I don't recall; but  
13 collectively we did so, yes.

14 Q. Did you yourself, by the way, go into any data room or go  
15 into an electronic data room?

16 A. Not that I recall.

17 Q. Let me ask you to turn to what I think is up there as  
18 Government Exhibit 179. Do you have that document?

19 A. Yes, I do.

20 Q. And, sir, do you recognize this from the footer and the  
21 notes -- the note in the upper right-hand corner as a document  
22 prepared by Weil, Gotshal?

23 A. It appears to be, yes.

24 Q. Does it bear a Bates number in the lower right-hand corner  
25 indicating it was produced from Weil, Gotshal's files?

Capdcol1

Westra - direct

1 A. Yes.

2 MR. CHERNOFF: Your Honor, the government offers 179.

3 MR. BACH: No objection.

4 THE COURT: Received.

5 (Government's Exhibit 179 received in evidence)

6 BY MR. CHERNOFF:

7 Q. So, first, Mr. Westra, let me just ask you to look down at  
8 the bottom of the document. There is a sort of tiny footer  
9 there.

10 Does that give you any indication as to which lawyer  
11 at Weil, Gotshal prepared or had ownership of this document?

12 A. There is the name Gewirtz, G-e-w-i-r-t-z, on the bottom,  
13 and I presume that that was one of the associates who was  
14 involved in the diligence effort.

15 Q. And was there in fact an Adam Gewirtz involved in the deal  
16 at some time?

17 A. Yes.

18 Q. And let me ask you to look up at the upper right-hand  
19 corner. You see there it says "WGM." Is that the initials for  
20 the full name of the firm, Weil, Gotshal & Manges?

21 A. Yes.

22 Q. You see a date of February 20, 2004. That, as you  
23 testified, was sometime during the due diligence that Weil,  
24 Gotshal was performing?

25 A. As I testified earlier, I believe that diligence commenced

Capdcol1

Westra - direct

1       in January or February, that's correct.

2       Q. And so this document is called "Project Royce Open  
3                   Diligence Issues."

4                   Do you remember what Project Royce was, sir?

5       A. Yes. That was the Refco transaction.

6                   (Continued on next page)

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CAPPOL2

Westra - direct

1 BY MR. CHERNOFF:

2 Q. And we see in Roman Numeral I additional diligence items  
3 needed?

4 A. Yes.

5 Q. As we're looking through this document, Mr. Westra, did you  
6 ever receive a copy of this, to your knowledge?

7 A. I don't recall.

8 Q. Let me ask you to look at Page 2, and we see it continues  
9 with a number of items that are apparently open issues. I'll  
10 ask Mr. Smith if we could focus on paragraph 12 at the bottom?

11 A. Yes, I see it.

12 Q. And this is titled minor points to keep track of. 12(e)  
13 says, "Copy of Proceeds Participation Agreement between Refco  
14 Group, Limited, LLC, and DF Capital, Inc."

15 Mr. Westra, do you remember Mr. Gewirtz or anybody  
16 bringing the fact that there was some kind of a Proceeds  
17 Participation Agreement to your attention?

18 A. No.

19 Q. Do you remember anyone telling you that it was a minor  
20 point?

21 A. No.

22 MR. CHERNOFF: You can take that down. Thank you,  
23 Mr. Smith.

24 Q. Mr. Westra, if I could ask you again to look at the EPMA,  
25 that's Government Exhibit 1005.1?

CAPPOL2

Westra - direct

1 A. Yes, I have it.

2 Q. And please flip to Page 8, section 3.5.

3 A. Yes, I have it.

4 Q. Okay. So this section in the middle of the page concerns  
5 governmental and third-party consents. I won't read the whole  
6 paragraph, but you're familiar with it, Mr. Westra?

7 A. Yes, I am.

8 Q. Was this language that you sought on behalf of your client,  
9 Thomas H. Lee?

10 A. Yes.

11 Q. And why did you seek this language; why was it important?

12 A. It's important because --

13 MR. BACH: Objection. Sorry it's late, but objection.

14 THE COURT: Go ahead, sir.

15 A. It was important because we wanted to know what consents,  
16 approvals of governmental entities or third parties were  
17 required to complete the transaction because we needed to  
18 understand what obstacles to completion existed, and we also  
19 wanted to understand if there were any parties, other than the  
20 government, who had any right to consent to this transaction.

21 Q. There's something towards the bottom of this paragraph that  
22 says -- I'll jump in the middle -- "to the extent the failure  
23 to obtain, make or give any of the foregoing," which I believe  
24 refers to the consents, "would not reasonably be expected to  
25 have a material adverse effect."

CAPPOL2

Westra - direct

1                   Mr. Westra, did you agree to that material adverse  
2 effect exception, as I'll call it?

3 A. Yes.

4 Q. And why did you agree to that?

5 A. We agreed to it because we understood that there might be  
6 minor third-party consents such as consent for a minor lease,  
7 or something of that nature, which was not important enough to  
8 warrant not proceeding with the transaction.

9 Q. I'm sorry, I couldn't hear. You gave an example of a  
10 minor --

11 A. Yes. For example, if there were a lease for a relatively  
12 unimportant leased facility for the company, and that lease had  
13 a provision that said that the consent of the landlord is  
14 required in order to sell the company, that would not have been  
15 sufficiently important for the transaction not to go forward or  
16 for it to be disclosed.

17                   So that was the purpose of that material adverse  
18 effect exception, to except those immaterial contracts.

19 Q. Could we now bring up Government Exhibit 1503 which is in  
20 evidence?

21 A. Yes, I have it.

22 Q. And, Mr. Westra, this is a letter agreement that, as you  
23 see in the first paragraph, makes reference to the Proceeds  
24 Participation Agreement that we've been talking about, and I'm  
25 going to refer to this, if I may, as the side-letter agreement.

CAPPOL2

Westra - direct

1                   First of all, Mr. Westra, was this side-letter  
2 agreement ever disclosed to you by Mr. Collins in the course --

3 A. No. I'm sorry. No.

4 Q. And do you recall when the first time you saw the  
5 side-letter agreement was?

6 A. It was in connection with the document which you referred  
7 to before as the participation agreement, which was following  
8 the collapse of Refco.

9 Q. Let me ask that we turn to Page 2, and this is section 5.1.

10 A. Yes, I have it.

11 Q. Okay. 5.1(a) says, "A sale of the company including the  
12 sale of all or substantially all of its outstanding membership  
13 shares shall be undertaken only with the consent of all the  
14 parties to this letter agreement; such consent shall not be  
15 unreasonably withheld by any party."

16                   Mr. Westra, before Refco collapsed, had you been told  
17 by Mr. Collins or anyone that a third-party or parties had to  
18 consent to the sale of Refco?

19 A. No.

20 Q. Let's look at 5.1 (b). This says that DFI, which I believe  
21 is defined somewhere as DF Capital, Inc., and DFI, after the  
22 February 28th, 2005, Refco Group Holdings, Inc. -- I'm not sure  
23 of those, but anyway, there it is -- "is entitled to withhold  
24 its consent, regardless of other reasons, if the purchase price  
25 for the sale of the company, including a sale of all or

CAPPOL2

Westra - direct

1 substantially all of its outstanding membership shares is less  
2 than \$1,650,000,000" and the language continues.

3 Mr. Westra, before Refco's collapse, were you ever  
4 told by Mr. Collins or anyone that a third party had the power  
5 to block the sale of Refco if the purchase price was below a  
6 certain amount?

7 A. No.

8 Q. In fact, the purchase price here was above that; is that  
9 correct?

10 A. The purchase price of the actual transaction?

11 Q. Yes.

12 A. Yes, it was.

13 Q. Let me now ask you --

14 MR. CHERNOFF: Actually, your Honor, at this time, I'd  
15 like to offer a stipulation between the parties.

16 THE COURT: Yes, sir. Is it fact?

17 MR. CHERNOFF: It's a testimonial stipulation  
18 concerning the Government Exhibit 501-O.

19 THE COURT: Ladies and gentlemen, same rules. This is  
20 evidence for your consideration. You must consider that the  
21 testimony recited in the stipulation would be given if the  
22 witness was called. The weight to be given to that testimony  
23 is, as always, up to you people.

24 MR. CHERNOFF: Sorry, your Honor. Your Honor,  
25 Government Exhibit 501-S, as a stipulation between the parties,

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1 states that Government Exhibit 1 -- "Government Exhibit 501-O  
2 is a true, accurate and authentic copy of an agreement entitled  
3 Fourth Amended and Restated Limited Liability Agreement of  
4 Refco Group, Limited, LLC, dated February 27th, 2003.

5 "2. If called as a witness, Holger, H-o-l-g-e-r  
6 Steinborn, S-t-e-i-n-b-o-r-n, who lives in Vienna, Austria,  
7 would testify as follows: Steinborn works for BAWAG" -- the  
8 full name of the bank is given in the stipulation -- "at its  
9 main office in Vienna, Austria;

10 "Government Exhibit 501-O was signed by Phillip  
11 Bennett on behalf of Refco Group Holdings, Inc., BAWAG  
12 Overseas, Inc. and Refco Group Holdings, LLC, and by Selcuk  
13 Sari on behalf of BAWAG Overseas, Inc.

14 "(c) Steinborn received Government Exhibit 501-O from  
15 his supervisor at BAWAG in Vienna, Austria;

16 "(d) Steinborn has no special knowledge of when  
17 Government Exhibit 501-O was signed.

18 "Further, the parties stipulate that this stipulation  
19 and the Exhibit 501-O can be offered into evidence." And I do  
20 so at this time, your Honor.

21 THE COURT: Received.

22 (Government's Exhibit 501-O received in evidence)

23 BY MR. CHERNOFF:

24 Q. Mr. Westra, what is an LLC agreement?

25 A. An LLC agreement is short for limited liability company

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1 agreement. That is the document which governs the affairs of a  
2 limited liability company.

3 Q. I'm going to ask you to look at what's just been admitted  
4 into evidence as Government Exhibit 501-O.

5 A. I have it, yes. Thank you.

6 Q. And do you see, as you flip through it, towards the last  
7 page, this is an executed copy of what's titled Fourth Amended  
8 and Restated Limited Liability Company Agreement of Refco  
9 Group, Limited?

10 A. Yes.

11 Q. In the course of due diligence, were LLC agreements  
12 something that Weil Gotshal wanted to receive on behalf of its  
13 client?

14 A. Yes.

15 Q. Why?

16 A. As I testified a moment ago, it is the document that  
17 governs the affairs of the limited liability company; so it was  
18 a critical document as part of our diligence.

19 Q. And, sir, this executed copy of the Fourth Amended and  
20 Restated Limited Liability Agreement, 501-O, were you ever  
21 given or shown this document during the due diligence?

22 A. No.

23 Q. Mr. Westra, when do you recall the closing in this  
24 transaction with Refco taking place?

25 A. In August of 2004.

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1 Q. And where was the closing at?

2 A. At the offices of Weil, Gotshal & Manges in New York City.

3 Q. Was there a closing binder prepared at that time?

4 A. Not at that time. There was a closing binder prepared  
5 after the closing.

6 Q. And what is a closing binder?

7 A. A closing binder is a bound volume of the documents that  
8 are placed on the closing table at the closing.

9 Q. Did you, yourself, sir, ever go through the closing binder?

10 A. No. Not to my recollection, no.

11 Q. Mr. Westra, did you invest any of your own money with  
12 Thomas H. Lee in the purchase of Refco?

13 A. Yes.

14 Q. How much did you invest?

15 A. I invested \$20,000.

16 Q. And how did you do that?

17 A. Wrote them a check. I had been invited by them to invest  
18 that amount in each investment that they did, which I did.

19 Q. In each investment they did, you mean Thomas H. Lee?

20 A. Correct.

21 Q. And so had you invested amounts of \$20,000 in prior deals  
22 you had worked on for them?

23 A. Yes.

24 Q. How much did you lose, by the way, in that investment?

25 A. My recollection is about \$5,000.

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1 Q. Let me ask you, shifting gears for a moment, about the  
2 other partial owner of RGHI, Tone Grant. Based on your  
3 understanding of the transaction you worked on, Mr. Westra, how  
4 much, roughly, did Tone Grant stand to earn in this deal for  
5 his partial ownership of Refco through RGHI?

6 A. We were told that Mr. Grant was a 50 percent holder of  
7 RGHI. RGHI, in turn, we were told, owned 90 percent of Refco  
8 Group and, therefore, Mr. Grant would have received a  
9 proportionate amount of the proceeds, which would have been  
10 hundreds of millions of dollars.

11 Q. And when you say you were told that Mr. Grant stood to  
12 receive hundreds of millions of dollars, who did you have those  
13 conversations with?

14 A. I had conversations with -- at the company and with the  
15 Mayer Brown attorneys as to the amount of stock that was owned  
16 by Mr. Grant. I don't recall any specific conversations about  
17 the amount of dollars that would be received other than a  
18 request at one time made by Mr. Collins asking if Mr. Grant  
19 could reinvest a portion of his proceeds into the deal going  
20 forward.

21 Q. Mr. Collins asked that Mr. Grant could reinvest going  
22 forward?

23 A. Mr. Collins related Mr. Grant had requested the right to do  
24 so, yes.

25 Q. Did he place any numbers or rough estimates as to what kind

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1 of investment Mr. Grant wanted to make?

2 A. I don't recall the amount.

3 Q. What was Thomas H. Lee's reaction to Mr. Collins'  
4 requesting that Mr. Grant be permitted to invest going forward  
5 in Refco?

6 A. The Thomas H. Lee Company declined that offer. As I've  
7 testified earlier, part of the thesis for the Lee company's  
8 investment was that they were investing in a new Refco, and  
9 that the prior equity investors, other than Mr. Bennett and  
10 BAWAG, were going to be cashed out as part of this transaction.

11 Q. And by the way, when you were told that Mr. Grant was going  
12 to earn hundreds of millions of dollars in this transaction,  
13 did that make sense to you, based on your understanding of the  
14 deal?

15 A. Yes.

16 Q. How come?

17 A. Because as I've just testified, we understood he owned  
18 50 percent of RGHI, which owned 90 percent of Refco, and the  
19 terms of the transaction provided for significant payments to  
20 the shareholders, including the \$500 million of excess cash,  
21 which we discussed earlier, some stock of certain companies  
22 they owned, and then \$1.7 billion of cash, less certain  
23 indebtedness.

24 Q. Let me ask you now to look at Government Exhibit 1005.28.

25 MR. CHERNOFF: I think this is already in evidence

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1 pursuant to our stipulation, but just to be safe, I offer it,  
2 your Honor.

3 THE COURT: Yes, sir, received.

4 (Government's Exhibit 1005.28 received in evidence)

5 A. I'm sorry, this is 1005.28?

6 Q. Yes, sir.

7 A. Yes, I have it.

8 Q. Okay. And so you'll see, Mr. Westra, that this is called a  
9 stock purchase agreement. It's between Mr. Bennett and  
10 Mr. Grant, correct?

11 A. Yes.

12 Q. And I'll ask you to just, as we scroll down through the  
13 document, it says among the "whereas" clauses, "the buyer,"  
14 that's Mr. Bennett, "wishes to purchase the shares from the  
15 seller and the seller desires to sell the buyer all of the  
16 shares."

17 And so this was the deal, as you understood it,  
18 Mr. Bennett was going to buy out Mr. Grant, correct?

19 A. When you say we understood it, we didn't --

20 Q. I'm sorry. I'm not asking about this agreement. You  
21 understood that Mr. Grant's interests would be bought out?

22 A. Not by -- Yes, we understood that Mr. Grant's interest  
23 would be extinguished as part of the transaction, that's  
24 correct.

25 Q. And that's how he received these hundreds of millions of

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1 dollars?

2 A. Correct.

3 Q. Okay. And if we could flip to Page 2 of this, sir?

4 A. Yes.

5 Q. There's a definition here you see cash amount?

6 A. Yes, I see it.

7 Q. And it's defined as \$4 million plus the estimated tax  
8 amount?

9 A. That's correct.

10 Q. Is this stock purchase agreement a document that you were  
11 provided in the course of your due diligence?

12 A. No.

13 Q. Do you remember when you first saw this?

14 A. I first saw this following the collapse of Refco.

15 Q. Did you ever learn, by the way, that this document had  
16 somehow been included in the closing binder?

17 MR. BACH: Objection to "somehow."

18 MR. CHERNOFF: I'll rephrase.

19 THE COURT: Thank you.

20 Q. Did you ever learn that this document had been included in  
21 the closing binder that was prepared after the transaction?

22 A. Yes.

23 Q. How did you learn that?

24 A. I learned that sometime after the collapse of Refco.

25 Q. Did anyone ever bring this document to your attention

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1 before that?

2 A. No.

3 Q. And what was your reaction upon learning that Mr. Grant was  
4 only receiving \$4 million, plus the estimated tax amount, for  
5 selling his interest in Refco to Mr. Bennett?

6 MR. BACH: Objection.

7 THE COURT: Basis?

8 MR. BACH: Relevance.

9 THE COURT: I'm sorry?

10 MR. BACH: Relevance.

11 MR. CHERNOFF: Let me be more focused, your Honor, so  
12 we can move this along.

13 THE COURT: All right.

14 Q. Did this \$4 million payment that Mr. Grant received comport  
15 with what you had been told by Refco in the course of the due  
16 diligence?

17 A. No.

18 Q. Let me ask you about another topic, Mr. Westra. What is a  
19 flow of funds memo?

20 A. A flow of funds memo is a memo that is prepared in  
21 connection with a transaction. It shows how the proceeds of  
22 the transaction are to be paid out to the various parties in  
23 connection with the transaction. Those parties being the  
24 sellers, as well as other parties such as banks, whose debt is  
25 being repaid, and advisers, whose fees are being paid.

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1 Q. Did you see a flow of funds memo in connection with the  
2 Refco deal?

3 A. Yes.

4 Q. And where was that prepared, do you know?

5 A. I'm sorry, where was it prepared?

6 Q. Do you know who prepared it or worked on it?

7 A. It was prepared in the first instance by Weil Gotshal, and  
8 then it was shared with Mayer Brown as counsel for the sellers  
9 to receive any input modifications, changes which they deemed  
10 appropriate.

11 Q. Let me ask you to look at Government Exhibit 1005.88.

12 A. Yes, I have it.

13 Q. Is this the flow of funds memo that, as you said, was  
14 initially prepared by Weil Gotshal?

15 A. Yes.

16 Q. And did you, yourself, personally review the flow of funds  
17 memo around the time of the closing?

18 A. Yes.

19 Q. What was your purpose in doing so?

20 A. I wanted to make certain that the appropriate amounts were  
21 paid to the appropriate parties.

22 Q. And did you determine that, to the best of your  
23 understanding, the appropriate amounts were being paid to the  
24 parties?

25 A. Yes.

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1 Q. Did you sign off on the final version of the flow of funds  
2 memo?

3 A. If you're asking if I had a physical signature, I don't  
4 know that, but I did approve it, yes.

5 Q. You did approve it. And why was it up to you or left to  
6 you to approve the final version?

7 A. Because as the --

8 MR. BACH: Objection.

9 THE COURT: Overruled. You may answer, sir.

10 A. As the partner who ultimately had responsibility for this  
11 transaction, it was my responsibility to make certain that the  
12 appropriate amounts were, in fact, being paid to the  
13 appropriate parties.

14 Q. Now, did you and Mr. Collins, in connection with the  
15 information in the flow of funds memo or otherwise, have a  
16 discussion as to how much of the proceeds from this transaction  
17 would go to BAWAG, the Austrian bank?

18 A. I don't recall any specific conversations, no.

19 Q. What was your understanding of what BAWAG would receive  
20 from the funds that would, so to speak, flow from this  
21 transaction?

22 A. They would receive, with respect to their equity interests,  
23 10 percent of the equity proceeds.

24 Q. Let me ask you to look at Page 5 of the flow of funds memo.

25 A. Yes, I have it.

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1 Q. We see there at the top, this refers to a wire transfer in  
2 the amount of \$191 million. Is that flow of funds entry here,  
3 the 191 million payment, consistent with what you understood  
4 BAWAG would get for its 10 percent interest in Refco?

5 A. Yes.

6 Q. Before this deal closed or at any time before Refco's  
7 collapse, were you ever made aware that BAWAG or a  
8 BAWAG-controlled entity would actually be getting hundreds of  
9 millions of dollars in addition from the closing of the Thomas  
10 H. Lee transaction?

11 A. No.

12 Q. Let me ask you to look at Government Exhibit 1821.

13 A. Yes, I have it.

14 Q. Sir, as you look through this document, does this also look  
15 like a flow of funds memo for a deal?

16 A. Yes.

17 Q. Is this a flow of funds memo that you received in  
18 connection with the closing of the Refco deal?

19 A. No.

20 Q. Let me ask you to look at Page 4, and you'll see there --  
21 Tell me when you have it, sir.

22 A. These pages don't appear to be numbered. It's just the  
23 fourth page in?

24 Q. Sir, if you want to look at the screen, I believe Mr. Smith  
25 has highlighted the portion on Page 4 I'll ask you about.

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1 A. Yes, I have it.

2 Q. We see here two different disbursements to the Desana  
3 Foundation in the amounts of 110 million and 566 million?

4 A. Yes.

5 Q. Did you ever know about those disbursements from the Refco  
6 deal proceeds?

7 A. No.

8 MR. CHERNOFF: Let me ask you if we could bring up  
9 Page 6.

10 Q. And, Mr. Westra, here there is a \$390 million payment; do  
11 you see that there?

12 A. Yes, I do.

13 Q. Going from one RGHI account to another?

14 A. Yes.

15 Q. Did you ever learn anything in connection with the closing  
16 about a \$390 million overdraft that RGHI would be repaying?

17 A. Are you asking me if I learned it at the time of the  
18 closing?

19 Q. Yes, sir.

20 A. No.

21 Q. When did you first see this flow of funds memo that we've  
22 just been looking at, the second one?

23 A. It was sometime after the collapse of Refco.

24 Q. And how did the information in this flow of funds memo  
25 compare to your understanding of how the funds were supposed to

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1 flow after the closing?

2 A. It is quite inconsistent with the flow of funds memorandum  
3 which we discussed earlier, which had been prepared in  
4 connection with the transaction.

5 MR. CHERNOFF: Thank you, Mr. Smith.

6 Q. Mr. Westra, after the closing was completed, was additional  
7 work done with Weil Gotshal's participation to obtain financing  
8 for the leveraged buyout?

9 A. After the acquisition was completed?

10 Q. Yes.

11 A. It was --

12 Q. Or around the time of the acquisition?

13 A. There was financing that was done concurrent with the  
14 acquisition, yes.

15 Q. And were you involved in that legal work?

16 A. I was to some extent. There were other partners at Weil  
17 who had primarily responsibility for the financing, but I was  
18 involved to some extent, yes.

19 Q. And what financing in particular were you referring to?

20 A. There were both senior financing and bonds that were  
21 issued, proceeds that were used together with the Lee company  
22 equity to fund the purchase price.

23 Q. Was Mr. Collins involved in that legal work as well?

24 A. Yes.

25 Q. Did there come a time when Refco shares were sold to the

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1 public in an initial public offering?

2 A. Yes.

3 Q. Was the Weil firm involved in legal work around that  
4 transaction?

5 A. Yes.

6 Q. Were you, yourself, involved in that?

7 A. I was. Again, there were other partners who had primary  
8 responsibility for that transaction, but I was also involved.

9 Q. And what about Mr. Collins and Mayer Brown, were they  
10 involved?

11 A. They were co-counsel on the offering and Mr. Collins was  
12 involved as well.

13 Q. We were talking about the collapse of Refco, and by that, I  
14 mean to speak of the bankruptcy filing in October of 2005. At  
15 that time, Mr. Westra, what had been your understanding of the  
16 amount of related-party debt that was still owed by RGHI to  
17 Refco?

18 A. It was my understanding that that was extinguished at the  
19 time of the August 2004 closing and that no incremental debt  
20 had subsequently been put in place.

21 Q. And in October of 2005, did you learn that, in fact, RGHI  
22 still owed Refco a substantial amount of money?

23 A. Yes.

24 Q. What was your reaction upon learning that?

25 A. I was shocked and very concerned.

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1 Q. And what, as a lawyer of Thomas H. Lee, did you do at that  
2 point?

3 A. I advised the Lee company that they should immediately  
4 reach out to Mr. Bennett to understand the facts, and that they  
5 should convene an immediate board meeting at which this topic  
6 would be discussed.

7 Q. Did that happen?

8 A. Both happened. They called Mr. Bennett, who was, my  
9 recollection, was in Tokyo at the time. He was instructed to  
10 fly back immediately, and a board meeting was convened very  
11 promptly thereafter.

12 Q. And what were the -- What was the focus of this board  
13 meeting? Why was it convened?

14 A. The board meeting was called to, first of all, determine  
15 the facts, whether, in fact, this loan was outstanding and, if  
16 so, to determine what the board's responsibility was to make  
17 public disclosure of that, since it had not theretofore been  
18 disclosed.

19 Q. And what sort of the legal concerns were at issue with  
20 respect to making a public disclosure like the one you were  
21 considering?

22 A. Under the securities laws, a public company has to make  
23 prompt disclosure of any material fact which may influence the  
24 trading price of its shares so that the investing public has  
25 all material information at its disposal in deciding whether to

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1 buy or sell those shares.

2 Q. And so after these board meetings, did Refco make such a  
3 disclosure?

4 A. Yes.

5 Q. After you learned about the continuing existence of  
6 related-party debt from RGHI to Refco, did you, Mr. Westra,  
7 have a conversation with Mr. Collins?

8 A. Yes.

9 Q. Was that before or after the public disclosure of the  
10 receivable had been made?

11 A. Before.

12 Q. Where did that conversation take place?

13 A. It was a telephone conversation that occurred during the  
14 board meeting. This board meeting went on for several days,  
15 though. I'm not sure of the exact date, but it was either at a  
16 break of the meeting, or I stepped out. I don't recall which.

17 Q. Roughly, how long was your phone call with Mr. Collins at  
18 that time?

19 A. It was only several minutes long.

20 Q. What did you say, and what did he say?

21 A. I indicated that we had a very significant issue; that we  
22 were determining what disclosure had to be made; that we were  
23 fairly certain that we had an issue as to which disclosure was  
24 required, and we would be working on understanding the facts  
25 and determining what to disclose and when to disclose it.

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1           His response was that we needed to be very careful in  
2 the disclosure that was made because it could have severe  
3 consequences to the company.

4 Q. And when Mr. Collins said that the disclosure could have  
5 severe consequences for the company, did he express any  
6 surprise or shock that there was an unpaid receivable from RGHI  
7 to Refco?

8           MR. BACH: Object.

9           THE COURT: I'll permit it. You may answer, sir.

10 A. I don't recall any such conversation, no.

11 Q. And after your client did make that disclosure, fair to say  
12 that there was, of course, the severe consequence for the  
13 company?

14 A. Yes, the company failed and ultimately filed bankruptcy.

15 Q. After the company failed and filed for bankruptcy, was your  
16 client, Thomas H. Lee, sued?

17 A. Yes.

18 Q. In general terms, who were the plaintiffs; who was suing  
19 them?

20 A. I don't recall all the specifics, but certainly there was a  
21 suit by the bankruptcy trustee, who was administering the  
22 affairs of the Refco bankrupt estate.

23 Q. Was Weil, your law firm, sued?

24 A. No.

25 Q. Did Weil make a payment to Thomas H. Lee in connection with

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Westra - direct

1 Thomas H. Lee's ultimate settlement of the lawsuits against it?

2 A. Yes.

3 Q. And at the time that Weil decided to contribute to that  
4 payment, were you a member of the management committee?

5 A. Yes. At Weil Gotshal, yes.

6 Q. And why did the Weil Gotshal firm decide to make the  
7 payment to Thomas H. Lee's settlement?

8 A. They were a very important client for the firm. We have --  
9 They paid a lot of fees to us, Refco and many other  
10 transactions. This was a very delicate time for the Lee  
11 company, and we felt that, in support of what had been a  
12 longstanding relationship and one which we expected to continue  
13 in the future, we would contribute to that settlement.

14 Q. How much did the Weil firm contribute?

15 A. I don't recall the amount.

16 Q. Since the collapse of Refco, has the Weil firm entered into  
17 any other settlements?

18 A. There was a settlement with the bankruptcy trustee, yes.

19 Q. And were you involved in the decision to enter into that  
20 agreement?

21 A. As a member of the management committee at Weil Gotshal,  
22 yes.

23 MR. CHERNOFF: May I have one moment, your Honor?

24 THE COURT: Yes, sir.

25 Q. Did the Weil firm, in connection with that settlement,

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1 agree or stipulate that it had done anything wrong or that it  
2 had a liability?

3 A. It expressly stated that it did not have liability and did  
4 not acknowledge any error.

5 Q. And so why did Weil Gotshal settle that particular suit?

6 A. Because we had engaged outside counsel to look at the  
7 facts. They felt that we had not erred or had any liability.

8 MR. BACH: Objection, hearsay.

9 THE COURT: Mr. Chernoff?

10 Q. Mr. Westra, I'll just ask you, without reference to outside  
11 counsel, why it was, from your vantage point on the management  
12 committee, that Weil decided to settle that suit?

13 A. We decided to settle the suit because of the realization  
14 that there was always uncertainty in any potential litigation.  
15 It was going to be very costly to pursue it, both in terms of  
16 expense, as well as devotion of manpower. We had significant  
17 insurance coverage to cover much of the settlement and,  
18 therefore, as a business matter, decided to settle and not have  
19 the claim paid.

20 MR. BACH: Objection. We move to strike the answer  
21 immediately preceding this.

22 MR. CHERNOFF: On consent, your Honor.

23 THE COURT: Ladies and gentlemen, the answer relating  
24 to whatever outside counsel said or felt is stricken. It will  
25 play no part in your deliberations.

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1 Q. And finally, Mr. Westra, I'm aware you no longer work at  
2 Weil, but are you aware of any outstanding litigation against  
3 Weil Gotshal related to the matters we've been talking about?

4 A. No.

5 MR. CHERNOFF: I have no further questions.

6 Thank you, Mr. Westra.

7 THE WITNESS: You're welcome.

8 THE COURT: Thank you. Do you want to break now,  
9 ladies and gentlemen? Yes. I see the nodding of heads. Would  
10 you follow the normal rules during your break. Please, take  
11 your pads, leave your folders, and don't discuss the case. See  
12 you in a couple of minutes, friends.

13 (Jury exits)

14 THE COURT: Sir, you may step down.

15 (Witness temporarily excused)

16 THE COURT: Won't you be seated, counsel.

17 MR. SCHWARTZ: Your Honor, we have just one issue. If  
18 Mr. Westra could step outside, please.

19 THE COURT: I think he's on his way out.

20 MR. SCHWARTZ: Excellent.

21 THE COURT: Mr. Westra, we're going to excuse you from  
22 the room for a few minutes, if you don't mind. Thank you, sir.

23 MR. SCHWARTZ: I would like to return to an objection  
24 that we made that your Honor overruled, just very briefly.  
25 Mr. Westra was asked a series of questions about the existence

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1 of two flow of funds memos, one of which he saw and one of  
2 which he didn't see.

3 It is the contention of the government in the case  
4 that Mr. Collins must have seen both of them and, therefore,  
5 would have known that they were inconsistent. That was clearly  
6 what they were trying to establish with him, and I think what  
7 they're going to argue to the jury, and that's what they argued  
8 to the jury the last time.

9 There is not a scintilla of evidence in this case,  
10 that I am aware of, that Mr. Collins actually saw the flow of  
11 funds memo to the Lee deal. And you may recall, your Honor,  
12 that there was an e-mail that I showed Mr. Trosten for which  
13 the final draft was circulated, and Mr. Collins was not on it.

14 What they -- The questions about the existence of two  
15 memos, we have no problem with. The question that we have the  
16 problem with is the following: "And why was it left up to  
17 you" --

18 THE COURT: Excuse me. Are you able to tell me what  
19 line it's at?

20 MR. SCHWARTZ: I certainly am, your Honor. On  
21 LiveNote, it's Page 56, Line 8.

22 THE COURT: Thank you. Let me just get to it. Yes,  
23 sir, go ahead.

24 MR. SCHWARTZ: Mr. Westra, was asked whether he  
25 approved it, and we don't object to that. We object to the

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1 next question: "Why," which is irrelevant, "was it up to you  
2 or left to you to approve the final version?"

3 Objection overruled.

4 Answer, "As the partner who ultimately had  
5 responsibility for this transaction, it was my responsibility  
6 to make certain that the appropriate amounts were, in fact,  
7 being paid to the appropriate parties."

8 That "why" is irrelevant to any issue in this case,  
9 except that Mr. Collins was the partner in charge on the Mayer  
10 Brown side, and the jury may be asked to infer or may infer  
11 from that answer that he, too, would have had to review that  
12 flow of funds memo.

13 It's the government's burden of proof to show that he  
14 saw it. They're not going to meet that burden of proof in this  
15 case, and they certainly can't do it by inference that since he  
16 approved it as the partner in charge, Mr. Collins, as partner  
17 in charge, would have seen it. There is no other reason in the  
18 world to ask this witness why he did that action, none that's  
19 relevant to this case. We ask that it be stricken.

20 THE COURT: Off the record.

21 (Discussion held off the record)

22 THE COURT: Anyway. Go ahead, Mr. Chernoff.

23 MR. CHERNOFF: Your Honor, it's a small point for the  
24 defense to ask for it to be stricken, but it is clearly  
25 relevant. Mr. Westra explained what he did with the flow of

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Westra - direct

1 funds memo, and what he did as the senior partner on the deal.

2 Now, there were other partners on the deal from the  
3 Mayer Brown firm and, apparently, the defense has excellent  
4 evidence that Mr. Collins did not receive the flow of funds  
5 memo because they're going to show this e-mail that he wasn't  
6 on.

7 On the other hand, they can also cross-examine  
8 Mr. Westra that he had no idea whether this was something that  
9 Mr. Collins did. He didn't discuss it with him, which I think  
10 was elicited, and I think that they will be able to make all  
11 the arguments they can that the better evidence is that  
12 Mr. Collins never saw this.

13 But, you know, it is a significant deal document, and  
14 so it's not surprising that Mr. Westra looked at it. And  
15 certainly, we'd be making the argument that Mr. Collins did,  
16 regardless of how Mr. Westra testified, but the defense is  
17 entitled to put in its proof to the contrary.

18 MR. SCHWARTZ: We proffered expert testimony on this  
19 very issue, which your Honor has yet to rule on, which is that  
20 the expert will testify that in transactions like this that  
21 senior partners on transactions often do not review flow of  
22 funds memos. The only thing in the record right now is that  
23 Mr. Westra, which was the senior partner, and therefore, I'm  
24 entitled to -- I did this. It's not probative of what  
25 Mr. Collins' practice was. That's the issue in the case.

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Westra - direct

1                   THE COURT: I don't think it's -- The question is, is  
2 it being offered as probative of Mr. Collins' practice? It  
3 can't be, right?

4                   MR. CHERNOFF: Your Honor, I guess what I'll say is,  
5 despite my strong views on what I just articulated, the last  
6 thing we want to do is even begin to open the door to the  
7 expert testimony that would consume, we don't know how long in  
8 this trial. And so we will consent to that being stricken.  
9 Although, I don't think any instruction should be given beyond  
10 the normal one your Honor would give.

11                  THE COURT: Well, the real question is how to strike  
12 it without emphasizing it.

13                  MR. SCHWARTZ: I would -- your Honor, I would think  
14 the way to strike it is the Court merely to say that Mr. Westra  
15 was asked why he viewed a flow of funds memo. I have stricken  
16 the question, and I have stricken the answer, and you may not  
17 consider the answer to the extent you remember it, in your  
18 deliberations. We'd ask that you not actually repeat the  
19 answer.

20                  THE COURT: Any objection?

21                  MR. CHERNOFF: No, your Honor.

22                  THE COURT: Thank you.

23                  MR. CHERNOFF: And we will not make any argument that  
24 Mr. Westra was an expert on this matter.

25                  MR. SCHWARTZ: Well, now you won't.

CAPPOL2

Westra - direct

1                   THE COURT: All right. Anything else, friends?

2                   MR. BACH: Yes, Judge. I raised before an issue of  
3 cross-examination relating to Mr. Westra. I would like to  
4 inquire of Mr. Westra what he was told by the legal team at  
5 Wilmer Cutler about the reasons for the transition from Wilmer  
6 Cutler to Mayer Brown.

7                   The government has made clear to the Court that that's  
8 an issue that it's going to explore later on in its case, and  
9 if Wilmer lawyers spoke to Dennis Klejna about it and that's  
10 relevant, I think it's relevant to hear what they said to  
11 Mr. Westra on the same topic.

12                  MR. CHERNOFF: Your Honor, what I guess Mr. Bach wants  
13 to offer is this witness' due diligence over a year later with  
14 respect to hearsay statements by Wilmer as to what happened in  
15 this transaction, being offered for the truth. That is clearly  
16 hearsay.

17                  We are not getting into, pursuant to the discussion we  
18 had this morning, why it was that Wilmer withdrew. So for  
19 Mr. Bach to try to get that from this witness, even if there  
20 were a hearsay exception, it would be irrelevant and  
21 inappropriate.

22                  I should also point out that I think Mr. Bach would  
23 open this door where we have to explore the fact that there was  
24 no actual waiver of attorney-client privilege, I believe, given  
25 in connection with the legal due diligence. And so we would

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Westra - direct

1 have to get into why it was that Wilmer said what they said, in  
2 the light of the fact that there was no such waiver.

3 We'd have to get into the depth of the due diligence  
4 that was done, and so now Mr. Bach tries to, I guess, impeach  
5 Mr. Maggio with the Wilmer witness with the hearsay that  
6 Mr. Westra may or may not have available.

7 THE COURT: Why is it not yet another level of  
8 hearsay, if this witness is going to repeat what he heard from  
9 somebody else?

10 MR. BACH: Well, it's the same thing as what the  
11 government wants to offer, Judge, and it's -- They are having  
12 hearsay statements, Wilmer Cutler to Dennis Klejna. We're  
13 asking to introduce hearsay statements from Wilmer Cutler to  
14 Mr. Westra. If this is going to be -- We can impeach hearsay  
15 with hearsay. If they're going to bring in hearsay, we're  
16 entitled to impeach it with hearsay.

17 MR. CHERNOFF: I believe that what your Honor ruled is  
18 what we will be eliciting is not hearsay. It is offered for  
19 the fact that Wilmer advised someone that this is what they  
20 will do. Mr. Bach wants to elicit why Wilmer did, including  
21 reasons that if he examined the Wilmer witnesses, which is why  
22 we have hearsay rules, he would learn that there were things  
23 that they knew and were aware of about the transaction, about  
24 the investigation, about Mr. Maggio that they did not share  
25 with the legal due diligence team because there was no waiver

CAPPOL2

Westra - direct

1 of attorney-client privilege.

2 And, in fact, Mr. Levy reminds me, we already agreed  
3 on the instruction it wasn't being offered for the truth; so I  
4 don't know how Mr. Bach can refer to our proffer as hearsay.

5 THE COURT: But, Mr. Bach, you would be eliciting this  
6 for the truth of the Wilmer statements, no?

7 MR. BACH: No, what I would be --

8 THE COURT: What do you expect this witness to say?

9 MR. BACH: I expect him to say that he had a  
10 conversation with Bill McLucas of the Wilmer Cutler firm.  
11 Mr. McLucas being in charge of that firm's work in connection  
12 with Sedona matter, that he inquired and was allowed to inquire  
13 about the reasons for the transition from Wilmer Cutler to  
14 Mayer Brown, and that Mr. McLucas told him that there was  
15 absolutely nothing improper about it and that there were  
16 strategic differences about how to approach the situation.

17 THE COURT: But that's the truth you want to argue,  
18 right?

19 MR. BACH: Well, what I want to show is that these are  
20 statements that are made to lawyers involved during the course  
21 of the conspiracy and that are communicated to Mr. Collins and  
22 they ultimate form his state of mind.

23 THE COURT: I don't get that. What do you mean these  
24 are statements during the course of the conspiracy? You're  
25 saying Wilmer is in on the conspiracy?

CAPPOL2

Westra - direct

1 MR. BACH: No, no. That's not what I'm saying. I'm  
2 saying --

3 MR. CHERNOFF: The statements were made a year later,  
4 your Honor. It had nothing to do with what Mr. Collins did  
5 with respect to Mr. Maggio at the time.

6 THE COURT: I don't think the cross-examination is  
7 appropriate because you are offering it for the truth, and  
8 that's before you get to the year later stuff.

9 MR. BACH: Judge, then I accept -- respectfully  
10 disagree, but accept the Court's ruling. But we renew our  
11 objection on that ground to what the government intends to do  
12 with it.

13 THE COURT: What about the apparent agreement that  
14 it's not being offered for the truth?

15 MR. BACH: We dispute that. We think it's being  
16 offered for no other purpose but the truth.

17 MR. SCHWARTZ: Your Honor ruled and we asked for a  
18 limiting charge, but we don't agree that it necessarily cures  
19 what the underlying defect was. That's all.

20 THE COURT: All right. I adhere to the prior ruling  
21 and will give the limiting charge that it's not being offered  
22 for the truth, but for the fact that the statement was made.  
23 Be sure that I do it at the time. Let's run out for five  
24 minutes quickly, please.

25 MR. SCHWARTZ: Thank you, Judge.

CAPPOL2

Westra - direct

1                   MR. CHERNOFF: Your Honor, with respect to Mr. Bach,  
2 said he had 40 minutes of cross. Even if that's increased, I  
3 wonder if we can try to push through because Mr. Westra, we  
4 arranged his schedule several times just to be with us, and he  
5 has to get back to Boston.

6                   THE COURT: Let's go fast. Off the record.

7                   (Recess taken)

8                   (Jury enters)

9                   THE COURT: Welcome back. Thank you for being so  
10 prompt. Thank you, friends. Won't you be seated.

11                  We move on now to the cross-examination of Mr. Westra.

12                  Mr. Bach?

13                  MR. BACH: Thank you, Judge.

14 CROSS-EXAMINATION

15 BY MR. BACH:

16 Q. Good morning, Mr. Westra.

17 A. Good morning.

18 Q. Mr. Westra, you were testifying about a telephone  
19 conversation that you had with Joseph Collins after news had  
20 come out in October 2005 that there were problems at Refco,  
21 correct?

22 A. Correct.

23 Q. And in the course of that brief conversation, as you  
24 described it, Mr. Collins suggested to you that the matter of  
25 disclosures being handled in a careful manner, correct?

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Westra - cross

1 A. Correct.

2 Q. And you agree with him, sir, that matters of disclosure  
3 have to be handled carefully, correct?

4 A. Yes.

5 Q. Nothing unusual about wanting to be careful about matters  
6 of disclosure, correct?

7 A. That's correct.

8 Q. You also described for the jury the data room that had been  
9 set up by Credit Suisse First Boston to make materials  
10 available for people who wanted to learn about the company; do  
11 you remember that?

12 A. I do.

13 Q. And attorneys from your firm went through that data room  
14 and looked at the materials?

15 A. That's correct.

16 Q. And you were kept informed of their efforts, correct?

17 A. In a general sense, yes.

18 Q. And Mr. Tabor was working with you, and he had more  
19 supervisory responsibility for that piece of the work, correct?

20 A. For the diligence, are you asking?

21 Q. For the diligence and the work in the data room.

22 A. Yes.

23 Q. But you knew, even though Mr. Tabor was in charge, you knew  
24 that colleagues of yours were going through the material in the  
25 data room and making lists of items that they found there,

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Westra - cross

1 correct?

2 A. They were certainly going through there and making notes on  
3 what they had found or what they needed to pursue.

4 Q. And you knew that they were making lists of things that  
5 they would want you or Mr. Tabor to see, correct?

6 A. Well, again, they were making a report on what they had  
7 found, and they would want us to review those reports, yes.

8 Q. And that's because someone, either yourself or primarily  
9 Mr. Tabor, would have to go through the lists of items they  
10 found and make decisions about whether there were things that  
11 needed to be reported to TH Lee or things that needed to be  
12 examined further, correct?

13 A. Well, I think you're not quite accurate in the way you're  
14 describing the process. As I've tried to explain, it's not a  
15 case where my associate would be making lists of things they  
16 found. It would be that they would be reporting on what they  
17 found, and they would often be making lists of things that they  
18 were told about which needed to be pursued.

19 Q. Wouldn't they make lists of things that you or Mr. Tabor  
20 needed to see?

21 A. I'm sorry, the question again, please?

22 Q. They would make lists of things that they -- that you or  
23 Mr. Tabor needed to see in order to fulfill your roles in  
24 connection with the --

25 A. They certainly made lists of open diligence items which

CAPPOL2

Westra - cross

1       needed to be pursued as part of our overall diligence efforts,  
2       yes.

3       Q.   And Dan Gewirtz was one of the associates on your team who  
4       was involved in that process, correct?

5       A.   Correct.

6                    MR. BACH: Could we put up on the board Defense  
7       Exhibit 179. Take that down. Can the government help us put  
8       up on the board the GX179? Do you have GX179? And can we blow  
9       that up?

10      Q.   The government showed you this list while they were asking  
11       you questions, right?

12      A.   Yes.

13      Q.   And there's no doubt in your mind that this is a list  
14       prepared by people at Weil Gotshal who were working as part of  
15       your team, correct?

16      A.   That's correct.

17      Q.   In fact, you showed us a footer that had the name of Dan  
18       Gewirtz, sort of last name, in it, right?

19      A.   That's correct.

20      Q.   And you were aware at this time that Mr. Gewirtz was  
21       actually preparing this list so that he could show it to you or  
22       Mr. Tabor?

23      A.   As I testified earlier, I don't recall seeing this list; so  
24       I really can't answer that question.

25      Q.   Okay. One moment. Let me show you what's been marked for

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Westra - cross

1 identification as Defendant's Exhibit 400.

2 Mr. Westra, I'm handing you what's been marked for  
3 identification as Defendant's Exhibit 400, and I'm going to ask  
4 you, sir, if those are a copy of notes, your personal notes, in  
5 connection with work you did on this transaction?

6 A. They are notes that I did make in connection with this  
7 transaction, yes.

8 MR. BACH: We offer them.

9 MR. CHERNOFF: Sorry, your Honor. Just one moment.  
10 Can I just ask Mr. Bach a question?

11 THE COURT: Yes.

12 MR. CHERNOFF: No objection.

13 MR. BACH: On consent with the government, we're just  
14 going to offer Page 23502.

15 THE COURT: Received.

16 (Defendant's Exhibit 400, Page 23502 received in  
17 evidence)

18 MR. BACH: Can we put this up on the screen and blow  
19 it up.

20 Q. And do you see at the top, Mr. Westra, it says the date,  
21 February 19th, 2004?

22 A. Yes.

23 Q. And that's the day before the typed list we just saw of  
24 the -- someone on your team made?

25 A. That's correct.

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Westra - cross

1 Q. And do you see at the top it says, "Dan Gewirtz"?

2 A. I do.

3 Q. And then a couple of lines down, it says "Dan;" do you see  
4 that?

5 A. I do.

6 Q. And then Item 2, can you read your notes for the jury?

7 A. It says, "He is doing list of things we need to see."

8 MR. BACH: You can take that down. If we could bring  
9 back up the Government's Exhibit. Go to Page 2, item 12.

10 Q. Again, this is prepared the day after those notes, correct?

11 A. That's the date stated, yes.

12 Q. And item 12 lists minor points to keep track of, correct?

13 A. Correct.

14 Q. And it refers to the Proceeds Participation Agreement and  
15 DF Capital Inc., correct?

16 A. Yes.

17 MR. BACH: We can take that down.

18 Q. You also testified about some meetings that you  
19 participated in in April 2004 in connection with preparing a  
20 document known as the letter of intent, correct?

21 A. That's correct.

22 Q. And in anticipation of those meetings, you and your law  
23 firm prepared a draft letter of intent to be discussed,  
24 correct?

25 A. That's correct.

CAPPOL2

Westra - cross

1 Q. And in advance of those meetings, you sent that draft over  
2 to Mr. Collins and Mr. Bennett so that they'd have it when they  
3 met with you, correct?

4 A. Yes.

5 Q. By the way, Mr. Westra, you have no specific recollection  
6 of ever meeting with Mr. Collins before those meetings in  
7 April, correct?

8 A. No recollection, no.

9 Q. And you don't have any record in the time records that you  
10 keep as an attorney of ever doing any legal work with him  
11 before April, correct?

12 A. I wouldn't know without looking at all the time records.

13 Q. Let me show you.

14 MR. BACH: I'm trying to push forward.

15 THE COURT: You're not going to make the witness look  
16 through all of his time records, are you?

17 MR. BACH: Will the government stipulate that there's  
18 no time record in March or February naming Mr. Collins?

19 MR. CHERNOFF: I thought the question was ever doing  
20 any legal work prior to April, and now Mr. Bach's asking about  
21 March and April?

22 MR. BACH: If the government will stipulate.

23 THE COURT: To what?

24 MR. BACH: That he has no time record mentioning Joe  
25 Collins before April of 2004, we can move on.

CAPP COL2

Westra - cross

1                   MR. CHERNOFF: Your Honor, I'll take Mr. Bach's word  
2 for it, and if that's not correct, we'll adjust it.

3                   (Continued on next page)

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Capdcol3

Westra - cross

1 MR. BACH: The same with this one.

2 MR. CHERNOFF: I'm sorry if I wasn't clear, your  
3 Honor. I am stipulating to what Mr. Bach has proffered pending  
4 my review of the documents, which I am sure will bear out what  
5 Mr. Bach has proffered.

6 THE COURT: All right. Let's go.

7 BY MR. BACH:

8 Q. And nowhere in your notes is there any mention of  
9 Mr. Collins before April, correct?

10 A. Again, I can't respond without looking at my records.

11 (Pause)

12 THE COURT: Now what? Let's go.

13 MR. CHERNOFF: Your Honor, maybe we can just stipulate  
14 to that as well on the same issue.

15 MR. BACH: If he has the notes in front him, I don't  
16 want to make him go through it --

17 THE COURT: Good, but we should have done this before.  
18 This is not a secret question. All right?

19 MR. BACH: OK.

20 THE COURT: All right.

21 BY MR. BACH:

22 Q. Now, before you met Mr. Collins in April, you had prepared  
23 this draft Letter of Intent? That's what we were talking about  
24 before.

25 Let me show you what's been marked for identification

Capdcol3

Westra - cross

1 as Defense Exhibit 224.

2 Mr. Westra, is this a document that you caused to be  
3 sent to Joe Collins on or about April 9, 2004?

4 A. Yes.

5 MR. BACH: We offer it.

6 MR. CHERNOFF: No objection, your Honor.

7 THE COURT: Received.

8 (Defendant's Exhibit 224 received in evidence)

9 MR. BACH: And if we can put Defendant's Exhibit 224  
10 up on the board?

11 Q. It is dated April 9, 2004, correct?

12 A. That's correct.

13 Q. And you sent this in anticipation of a meeting with  
14 Mr. Collins, correct?

15 A. Yes.

16 Q. And if we look at -- go to Bates page 6074.

17 A. Yes, I have it.

18 Q. And blow up 1(a).

19 That is a reference to \$500 million that Refco would  
20 distribute, correct?

21 A. Correct.

22 Q. And that's something that you had discussed with Refco's  
23 management and Credit Suisse First Boston before you ever met  
24 Mr. Collins, correct?

25 A. I don't know the sequencing.

Capdcol3

Westra - cross

1 Q. But you do know that you have no recollection of meeting  
2 Mr. Collins before these meetings in April?

3 A. What I testified before was that I only recalled meeting  
4 Mr. Collins at the meeting in which we describe this. I know  
5 we had telephone calls before that. I don't recall when or how  
6 many.

7 Q. Do you have any specific recollection of any telephone  
8 calls or meetings with Mr. Collins before April?

9 A. If you're asking me as to specific dates, no.

10 Q. As to a specific conversation.

11 A. I recall having conversations about the transaction more  
12 generally, yes.

13 Q. Could you relate the details of any one to us today?

14 A. It was eight years ago. I don't recall.

15 Q. At these meetings in April, you don't recall Mr. Collins  
16 making any specific representations about the \$500 million,  
17 correct?

18 A. As I testified earlier, I recall Mr. Bennett making that  
19 representation in Mr. Collins' presence. I testified I did not  
20 recall Mr. Collins making a representation.

21 Q. You also recall Mr. Bennett made representations in  
22 Mr. Collins' presence about how shareholder loans would be  
23 zeroed out at the closing, correct?

24 A. Correct.

25 Q. Now, you represented TH Lee in this transaction, and the

Capdcol3

Westra - cross

1 person who you principally interacted with was a man named  
2 Scott Schoen, correct?

3 A. You asked me the person at the Thomas H. Lee Company?

4 Q. Yes.

5 A. Yes.

6 Q. Throughout the work you did on this transaction you would  
7 consult with Mr. Schoen on a regular basis, correct?

8 A. That's correct.

9 Q. So that you could keep him up to date on things that you  
10 learned and that he could keep you up to date on things that he  
11 learned?

12 A. To the extent that we both deemed appropriate, yes.

13 Q. Did Mr. Schoen ever tell you that he had a conversation  
14 with Phil Bennett to get a Reader's Digest version or a general  
15 businessman's understanding of where some of the proceeds of  
16 the Lee transaction would go?

17 A. I don't recall that, no.

18 Q. Did Mr. Schoen ever tell you that Phil Bennett told him, in  
19 such a conversation, that Tom Dittmer would be getting 75 to  
20 \$100 million?

21 A. Not that I recall.

22 Q. You testified, in response to some of Mr. Chernoff's  
23 questions, that your expectation was that BAWAG was getting  
24 10 percent of the proceeds, or approximately \$191 million,  
25 correct?

Capdcol3

Westra - cross

1 A. I testified that I understood that he would be getting  
2 10 percent of the equity proceeds, yes.

3 Q. And you also testified that you did not know that BAWAG  
4 would be getting any hundreds of millions of dollars beyond  
5 that, correct?

6 A. Not exactly proceeds, no.

7 Q. Did Mr. Schoen ever tell you that Mr. Bennett told him, in  
8 a conversation between him and others, that BAWAG would be  
9 getting an additional 400 to \$500 million?

10 A. I have no recollection of that.

11 Q. And you and Mr. Schoen have a relationship that goes back  
12 well before this particular deal, correct?

13 A. That's correct.

14 Q. And you've worked together on a number of transactions,  
15 correct?

16 A. Yes, we had.

17 Q. And ordinarily he shares with you, or you expect him to  
18 share with you information that he deems to be material,  
19 correct?

20 A. I would.

21 Q. By the way, you testified that you were surprised to see  
22 the amount of money that Mr. Grant was due to receive.

23 A. That is correct.

24 Q. Had you known that hundreds of millions of dollars were  
25 going to BAWAG and 75 to \$100 million were going to

Capdcol3

Westra - cross

1 Mr. Dittmer, would you have expected Mr. Grant to receive less?

2 A. I can't really state that because I don't know from where  
3 those monies would have come.

4 Q. If you knew they were coming from the proceeds, would you  
5 have expected it to be less?

6 A. Again, it would depend upon whether they were coming from  
7 the proceeds otherwise payable to RGHI.

8 Q. So if you knew the money was coming from RGHI's proceeds,  
9 you would have expected Grant to receive less, correct?

10 A. I want to make sure I understand your question.

11 Are you asking whether if I knew that the money --  
12 first of all, if I knew that money was being paid to Dittmer  
13 and to BAWAG and if I knew that money was coming from proceeds  
14 otherwise due to RGHI, would I expect Mr. Grant, as a  
15 50 percent owner of RGHI, to receive less? Is that the  
16 question?

17 Q. Yes.

18 A. I would expect him to receive less unless those monies were  
19 coming from Mr. Bennett's share.

20 Q. Now, separate from any conversation with Mr. Schoen, you  
21 knew that Mr. Dittmer had an interest in the proceeds, correct?

22 A. I did not.

23 Q. Let me show you what's been marked for identification as  
24 Defense Exhibit 403.

25 (Pause)

Capdcol3

Westra - cross

1                   THE COURT: Question?

2 Q. This is an e-mail you received from Dan Gewirtz on  
3 February 28, 2004, correct?

4 A. That's correct.

5                   MR. BACH: We offer it.

6                   MR. CHERNOFF: Objection, your Honor.

7                   THE COURT: Yes, sir.

8                   MR. CHERNOFF: It is an e-mail that apparently  
9 attaches a news article. I don't know what the news article is  
10 being offered for, whether it is true.

11                  If Mr. Bach wanted to ask Mr. Westra questions about  
12 whether he read this or whether he knew of it, that is fine,  
13 but the news article, which I haven't read, should not be  
14 admitted.

15                  MR. BACH: We will offer it for the purpose that he  
16 received it and saw it, but we are not offering it for the  
17 truth.

18                  MR. CHERNOFF: Your Honor, it is either in or out. We  
19 object to the article.

20                  THE COURT: What about the article, please, Mr. Bach?

21                  MR. BACH: We are not offering the contents of the  
22 article for its truth. We are offering it to show that  
23 Mr. Westra received it and was aware of what the article said.

24                  THE COURT: How can you say that he was aware of what  
25 it said if you don't ask him?

Capdcol3

Westra - cross

1                   MR. BACH: I just want to ask him if he saw an article  
2 that said this. I am not going to ask him whether he believed  
3 the article to be true or not.

4                   THE COURT: Mr. Chernoff.

5                   MR. CHERNOFF: Why don't we take it up after Mr. Bach  
6 asks those questions because I don't think he had that  
7 foundation.

8                   MR. BACH: I didn't hear that.

9                   THE COURT: Ask the questions as foundation is what  
10 counsel is saying.

11                  MR. BACH: OK.

12                  THE COURT: All right. Go ahead.

13 BY MR. BACH:

14 Q. Mr. Westra, this is an e-mail addressed to you, Mr. Tabor  
15 and Conrad Bahlke at the Weil, Gotshal law firm, correct?

16 A. Yes.

17 Q. And it was sent to you by Daniel Gewirtz on February 28,  
18 2004, correct?

19 A. That is correct.

20 Q. And this was during the period in which your law firm had  
21 been retained to look at Refco and conduct due diligence on it,  
22 correct?

23 A. Yes.

24 Q. And as part of that due diligence your team was looking for  
25 sources of public information that might shed light on Refco,

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Westra - cross

1 correct?

2 A. That's correct.

3 Q. And they would forward to you those pieces of public  
4 information that they felt you should see, correct?

5 A. That is correct.

6 Q. Did you receive this?

7 A. I don't have any recollection of it, no.

8 Q. But it has your name on it, correct?

9 A. It is.

10 Q. You have no reason to doubt you received it, correct?

11 A. As I said, I have no recollection either way.

12 Q. Do you have any reason to doubt that you received it?

13 A. I have no reason to doubt it. I don't know.

14 MR. BACH: We offer it.

15 THE COURT: The other question you were supposed to  
16 ask is whether or not he read it.

17 MR. BACH: Ah.

18 Q. Was it your habit to review material that your colleagues  
19 conducting due diligence sent to you?

20 A. Generally, yes.

21 Q. Did you -- we offer it.

22 THE COURT: That is not the question, is it?

23 MR. BACH: I will ask the next question.

24 Q. Did you review this article when you received it?

25 A. Yes. I said I have no recollection of ever receiving the

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Westra - cross

1 e-mail; therefore, I can't have any recollection of having read  
2 the article.

3 Q. But it was your habit, correct, to read these articles?

4 A. As I testified earlier, it is generally my habit to read  
5 e-mails that were sent to me by people doing diligence for me.

6 MR. BACH: We offer it.

7 MR. CHERNOFF: Your Honor, we have no objection if it  
8 is admitted for the purpose only that it was sent to the  
9 witness and that the article was not -- it is not being offered  
10 for the truth of its content.

11 THE COURT: The document, 403, is received, ladies and  
12 gentlemen, for the purpose that it was sent to the witness. It  
13 is certainly not being received for the truth of the article  
14 that is attached.

15 (Defendant's Exhibit 403 received in evidence)

16 MR. BACH: It is being offered, Judge, consistent with  
17 his habit for reviewing these types of materials.

18 THE COURT: The same thing.

19 MR. BACH: Can we put it up on the screen, please.

20 MR. CHERNOFF: With the limiting instruction, I'm  
21 sorry, that the witness didn't read the article. If it is  
22 being offered for the fact that it was sent to him, I don't  
23 know why we are going through it.

24 THE COURT: I think the jury has heard the witness'  
25 testimony that he has no recollection of receiving the e-mail

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Westra - cross

1 or the article.

2 Let's move it along.

3 MR. SCHWARTZ: Your Honor, may we have a very brief  
4 sidebar?

5 THE COURT: Sure.

6 Mr. Reporter, if you would.

7 (Continued on next page)

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Westra - cross

1 (At the sidebar)

2 THE COURT: Counsel.

3 MR. SCHWARTZ: Your Honor, we have the testimony that  
4 is admissible to prove that someone acted consistently with his  
5 habit. The fact that he has no recollection, which is what you  
6 just referenced to the jury, is fine. But we are entitled to  
7 argue that he acted consistently with his habit, and I think  
8 what you just charged the jury kind of takes that away from us.

9 The government is objecting to habit testimony. The  
10 rule of evidence specifically permits it for the fact --

11 THE COURT: That question was just answered.

12 MR. SCHWARTZ: But it is permitted for fact that he  
13 read it. And the government is saying -- he keeps jumping up  
14 saying that he doesn't remember reading it. We are not saying  
15 he remembers reading it. We are saying he read it.

16 The jury has been told he has no recollection by the  
17 Court, as if that's what's important here. His recollection is  
18 not important here.

19 THE COURT: I was only responding to the government  
20 saying -- one of you, I don't remember, I assume it was  
21 Mr. Chernoff saying that he had gap. My point is the jury  
22 heard it.

23 MR. SCHWARTZ: I'm not in any way complaining about  
24 what your Honor -- what your point was, your Honor, but I think  
25 that the jury may have the misimpression that if he doesn't

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1 remember it, it doesn't matter anymore. And I think they  
2 should be told that habit testimony is admissible and they can  
3 give it whatever weight they want.

4 THE COURT: They are going to be told that at the end  
5 and I'm certain Mr. Bach is going to get that in again as he  
6 goes forward. But he did -- the question was asked and the  
7 answer was given, it was your habit, and that was after his  
8 general habit was testified to.

9 MR. SCHWARTZ: OK.

10 MR. CHERNOFF: Your Honor, my only objection related  
11 to what was just on this, that I am just wondering, in light of  
12 the fact that we just had five hypotheticals and now we are  
13 moving to questions about an article that the witness doesn't  
14 remember that the defense put into evidence. Now it is clear  
15 they are going to argue it is habit to review it. But all I am  
16 saying, for the sake of moving this examination along --

17 MR. SCHWARTZ: It is nice to have the sake of moving  
18 the examination along. We are entitle to cross-examine a  
19 witness who just said that he didn't know that Dittmer was  
20 getting paid --

21 THE COURT: Kids, let's not. Off the record.

22 (Discussion off the record)

23 (Continued on next page)

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Westra - cross

1 (In open court)

2 THE COURT: Mr. Bach.

3 BY MR. BACH:

4 Q. Dan Gewirtz writes: "Gentlemen, Ed Domingo found an  
5 article on Refco you will find interesting."

6 Do you see that?

7 A. Yes.

8 Q. And let's take a look at page 407, and blow up the first  
9 paragraph under the word "body."

10 It says: "Tom Dittmer, the widely known and  
11 controversial figure who has been at the center of the futures  
12 industry as head of Refco Group Limited for more than 20 years,  
13 has given up his 51 percent ownership stake in the privately  
14 held firm for what one source described as a 'carrier' interest  
15 that would provide him a payout should Refco sell itself or  
16 issue shares in a public offering."

17 Did I read that correctly?

18 A. You did.

19 Q. And, Mr. Westra, if you had acted consistently with your  
20 habit, this is an article that you would have read, correct?

21 A. That's correct.

22 Q. Let's switch topics.

23 You told the jury about a conversation you had with  
24 Joe Collins in which Mr. Collins communicated to you that  
25 Mr. Grant had a desire to stay in the deal, correct?

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Westra - cross

1 A. Correct.

2 Q. And Mr. Grant was one of the owners of Refco through RGHI,  
3 correct?

4 A. That's correct.

5 Q. And what Mr. Collins had conveyed to you was that Mr. Grant  
6 wanted to be an ongoing equity participant, correct?

7 A. That's correct.

8 Q. Meaning he wanted to have a piece of the rollover equity in  
9 the New Refco just like Phil Bennett did, correct?

10 A. Not of the same magnitude but he wanted an ongoing equity  
11 interest.

12 Q. Yes. Not of the same magnitude, but of the same type, that  
13 is, a piece of rollover equity, correct?

14 A. I don't think it was ever specified as to what the  
15 investment would be, but, conceptually, yes, he would have a  
16 piece of the ongoing entity.

17 Q. And you understood that to be as an ongoing equity  
18 participant, correct?

19 A. Correct.

20 Q. He wasn't asking to make a cash investment in Refco,  
21 correct?

22 A. I don't recall how the investment would have been funded.

23 Q. OK. And this was brought up at the beginning of the  
24 discussions about how this deal would take place, correct?

25 A. I don't recall when it was brought up.

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Westra - cross

1 Q. But this was a time when you were discussing with  
2 Mr. Collins and Mr. Bennett what the terms of this deal would  
3 be, correct?

4 A. Well, it was obviously brought up before the agreement was  
5 signed. As I testified, I don't recall when.

6 Q. So you don't recall if this conversation was at the  
7 beginning, when people were discussing what the basic terms of  
8 the deal would be, or later as the deal progressed; you have no  
9 memory of that?

10 A. No. No, I don't.

11 Q. And no one -- no one at Mayer Brown ever told you that Tone  
12 Grant was going to get hundreds of millions of dollars in cash  
13 out of this deal, correct?

14 A. That's correct.

15 Q. This conversation was about an equity interest, correct?

16 A. That's correct.

17 Q. And the leveraged buyout transaction that we've been  
18 discussing closed on August 5th in 2004, is that correct?

19 A. That's correct.

20 Q. And the day before, on August 4th, there was an event known  
21 as a preclosing, correct?

22 A. That is correct.

23 Q. And that's where important documents are laid out on tables  
24 so that the lawyers and parties can look at them and people can  
25 sign what they have to sign, correct?

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Westra - cross

1 A. That's correct.

2 Q. And you were at that preclosing event, correct?

3 A. For part of it, yes.

4 Q. And when you were there for part of it, you ran into a man  
5 named Tone Grant, right?

6 A. Yes, I did.

7 Q. And you and Mr. Grant have a common interest in Ivy League  
8 football, correct?

9 A. We do.

10 Q. And you and Mr. Grant had a discussion about Ivy League  
11 football at that event, correct?

12 A. We did.

13 Q. And there is no doubt in your mind that Mr. Grant was  
14 actually at that closing where documents were laid out to be  
15 signed, correct?

16 A. He was certainly there for part of that preclosing.

17 Q. OK. And after that you and Mr. Grant went out for dinner  
18 together that night, correct?

19 A. No.

20 Q. The next night?

21 A. Pardon me?

22 Q. The next night.

23 A. No.

24 Q. When did you and Mr. Grant go out to dinner?

25 A. It was sometime after closing.

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Westra - cross

1 Q. OK. But you arranged at the closing to meet each other for  
2 dinner?

3 A. I don't think we arranged it at the closing. I think it  
4 was sometime after that night. Actually, it was dinner in  
5 Chicago, not New York.

6 Q. OK. And after that closing, all of the basic deal  
7 documents were put together in something called a closing  
8 binder, is that right?

9 A. That's correct.

10 Q. And it was lawyers at your firm who put that together,  
11 correct?

12 A. It was lawyers at our firm and Mayer Brown.

13 Q. Your firm was the -- represented the buyer in this  
14 transaction, correct?

15 A. That's correct.

16 Q. And typically it is the buyer who puts together the closing  
17 binder, correct?

18 A. As I say, it is a collective exercise of both -- of counsel  
19 on both sides of the transaction.

20 Q. But in any event, in that closing binder was a copy of the  
21 stock Purchase Agreement that was signed by Phillip Bennett, on  
22 the one hand, and Mr. Grant, on the other hand, correct?

23 A. That is correct.

24 Q. And your law firm certainly had possession of that closing  
25 binder and all the materials inside, correct?

Capdcol3

Westra - cross

1 A. You are asking me if we had possession of the binder after  
2 it was assembled, or are you asking if we had possession of the  
3 agreement to which you are referring?

4 Q. You didn't have possession of the binder before the binder  
5 was assembled, correct?

6 A. No. I'm trying to answer your question.

7 Are you asking if we had possession of the binder  
8 after it was prepared?

9 Q. Yes. After the binder was put together and prepared, your  
10 law firm had a copy of it, correct?

11 A. Correct.

12 Q. Let me show you what's been marked for identification as  
13 Defense Exhibit 1010.

14 Mr. Westra, is this a copy of the cover of that binder  
15 and its table of contents?

16 A. It appears to be.

17 MR. BACH: We offer it.

18 MR. CHERNOFF: No objection.

19 THE COURT: Received.

20 (Defendant's Exhibit 1010 received in evidence)

21 MR. BACH: Can we pull it up?

22 Q. On the cover it says, "Acquisition of New Refco Group  
23 Limited, August 5, 2004." Do you see that?

24 A. Yes.

25 Q. At the top it lists your client, Thomas H. Lee Partners,

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Westra - cross

1 correct?

2 A. Correct.

3 Q. Can we turn to Bates page 006. And blow up Roman 4 and  
4 just under it.

5 Roman numeral 4 refers to the Tone Grant purchase  
6 transactions, correct?

7 A. Yes.

8 Q. And the first item on that list is "Stock Purchase  
9 Agreement, dated as of August 2, 2004, by and between Phillip  
10 R. Bennett and Tone N. Grant," correct?

11 A. That's correct.

12 Q. There is no doubt in your mind that your law firm received  
13 this binder and this document, correct?

14 A. You're asking me if there is any doubt in my mind that my  
15 law firm had the binder with this in it. The answer to that is  
16 no, I certainly did.

17 Q. Sir, can we blow up down at the bottom of the page, blow up  
18 the footer.

19 This is a Weil, Gotshal & Manges footer, correct?

20 A. Yes.

21 Q. Your law firm prepared the table of contents for this,  
22 correct?

23 A. It appears to have.

24 Q. Now, after -- you can take that down.

25 After the LBO closed, your law firm went on to

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Westra - cross

1 represent the New Refco entity in connection with an initial  
2 public offering of stock, correct?

3 A. As I testified earlier, we were co-counsel with Mayer  
4 Brown.

5 Q. But you were the lead counsel on that, correct?

6 A. We were co-counsel. I would say we probably had the  
7 greater responsibility.

8 Q. Is it not fair to say, sir, that your firm took the lead on  
9 the initial public offering?

10 A. I just testified that we were co-counsel with Mayer Brown  
11 and that we probably had the primary responsibility.

12 Q. You took the lead, right?

13 A. I don't know how else I could say it.

14 Q. Mr. Westra, you testified at a prior proceeding in  
15 March 2009 under oath, correct?

16 A. I don't recall the exact date to which you are referring.  
17 I had certainly testified in prior proceedings before.

18 Q. And you were asked this question and gave --

19 MR. CHERNOFF: Can we have a sidebar, your Honor?

20 THE COURT: Yes.

21 (Continued on next page)

Capdcol3

Westra - cross

1 (At the sidebar)

2 MR. BACH: (Indicating to the Court).

3 THE COURT: Counsel.

4 MR. CHERNOFF: Your Honor, I am really sorry to have  
5 to ask for a sidebar on this but I've got to put my foot down.  
6 This is not an inconsistent statement. He asked the witness  
7 three times were you the lead counsel. He said we were  
8 co-counsel, we had the primary responsibility.

9 Now Mr. Bach wants to offer this for an inconsistent  
10 statement that it appears he said we took the lead? The  
11 witness never said we were the lead counsel in any prior  
12 proceeding that I am aware of. He said we are co-counsel. He  
13 either took the lead or he had primary responsible is what he  
14 just said. This is not an inconsistent statement, and I can't  
15 believe that Mr. Bach is going to read this to the jury. It is  
16 improper.

17 THE COURT: What about the part where he says we were  
18 co-counsel?

19 MR. BACH: I will read that to him, too, but he is  
20 denying that he took the lead.

21 MR. CHERNOFF: He was asked, were you lead counsel.

22 MR. BACH: Do you want me to ask him if he took the  
23 lead? I will rephrase the question.

24 MR. CHERNOFF: No, we should move on. He has already  
25 answered that he took primary responsibility. This is the most

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Westra - cross

1 silly thing to have happening on further questioning of this  
2 witness or even a sidebar about.

3 THE COURT: I think it is just -- I don't know why we  
4 are doing this. I will let you read it but you have to read  
5 the whole thing.

6 MR. BACH: Absolutely.

7 THE COURT: Let's go.

8 (Continued on next page)

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Capdcol3

Westra - cross

1 (In open court)

2 BY MR. BACH:

3 Q. At a prior proceeding in May 2009, you were asked the  
4 following questions and gave the following answers:

5 "Q After the LBO, your law firm continued to do work in  
6 connection with the Refco acquisition, correct?

7 "A Both me and Mayer Brown did, yes.

8 "Q Your firm took lead on the initial public offering of stock  
9 about a year later, right?

10 "A We took the lead. We were co-counsel. We took the lead.  
11 That's correct."

12 MR. CHERNOFF: I just couldn't hear Mr. Bach when he  
13 said "we were co-counsel."

14 THE COURT: I told you you had to read the whole  
15 thing.

16 MR. BACH: I read the whole thing and he read part of  
17 it again.

18 BY MR. BACH:

19 Q. Your firm also took the lead in the bond offering that was  
20 conducted at about the same time as the LBO, correct?

21 A. Well, you've just made a presumption in what you've said.  
22 As I have said before, the IPO, we were co-counsel. We took  
23 the primary responsibility. If you want to call that lead, I  
24 don't see the distinction but that is fine.

25 Q. You called it the lead, correct?

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Westra - cross

1 A. I'm simply telling you that I see no distinction between  
2 the two statements I have made.

3 With respect to the bond offering, we were counsel to  
4 the company in that, too, yes.

5 Q. And you took the lead in that -- your firm took the lead in  
6 that, too, correct?

7 A. We were primarily responsible for that transaction as well.

8 Q. At that same prior proceeding you were asked this question  
9 and you gave this answer under oath:

10 "Q Your firm took the lead in a bond offering that was related  
11 to the LBO, correct?

12 "A Yes, they did."

13 Were you asked that question and did you give that  
14 answer?

15 A. If it is the testimony, the answer is yes.

16 As I just said, I see no distinction between saying we  
17 were primarily responsible and we took the lead. It means the  
18 same thing.

19 Q. Now, in connection with your work, your firm's work on the  
20 leveraged buyout transaction, your firm did nothing to cause  
21 that Tone Grant stock Purchase Agreement to be disclosed to the  
22 public bond investors, correct?

23 A. That is correct. We were not aware of it.

24 Q. And in connection with the IPO transaction, your firm did  
25 nothing to cause the disclosure of that Tone Grant stock

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Westra - cross

1 Purchase Agreement to the public investors, correct?

2 A. The answer is the same. We did not -- we weren't aware of  
3 it.

4 Q. But it was in the closing binder that was in your office  
5 and of which your law firm prepared the table of contents,  
6 correct?

7 A. Along with 90 other documents and it was in contravention  
8 of representations and warranties in the Purchase Agreement.

9 MR. BACH: I move to strike the last answer.

10 THE COURT: I'll permit it.

11 BY MR. BACH:

12 Q. Mr. Westra, you testified that you reviewed a flow of funds  
13 memorandum in connection with this transaction, correct?

14 A. Correct.

15 Q. And the government showed you a different flow of funds  
16 memorandum that showed payments going to an entity called  
17 Desana?

18 A. That's correct.

19 Q. And also listed an overdraft, correct?

20 A. Correct.

21 Q. And you said that that was a flow of funds memorandum that  
22 you didn't see, correct?

23 A. I had said I did not see it until after the collapse of  
24 Refco.

25 Q. Right. While you were working on the deal at the time,

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Westra - cross

1 this is a document that you did not see, correct?

2 A. Not to my recollection, no.

3 Q. And you don't expect to see, Mr. Westra, flow of funds  
4 memos for what a parent holding company does with proceeds of  
5 the sale after it receives them, correct?

6 A. Typically, no.

7 Q. And -- typically no. Thank you.

8 In connection with the bond offering, did your firm  
9 cause copies of Refco's financial statements to be disclosed to  
10 the public?

11 A. Well, the company caused them to be disclosed.

12 Q. And for how many years back?

13 A. I don't recall but I presume it was three years back.

14 Q. And based on your experience, isn't it a fact that three  
15 years' worth of financial statements are always disclosed in  
16 connection with public bond offerings?

17 A. Yes.

18 Q. And based on your experience, isn't it a fact that three  
19 years' worth of financial statements are always disclosed in  
20 connection with an initial public offering?

21 A. If the company has been around for three years, yes.

22 Q. As part of your due diligence, did you look at litigations  
23 and enforcement matters that Refco was involved in?

24 A. Some of them, yes.

25 Q. Was one of the matters that you looked at the Sedona

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Westra - cross

1 matter?

2 A. Yes.

3 Q. And you and your firm wanted to learn more about that,  
4 correct?

5 A. That's correct.

6 Q. And you had conversations with Joe Collins about it,  
7 correct?

8 A. We did.

9 Q. And you had conversations with Dennis Klejna about it,  
10 correct?

11 A. That's correct.

12 Q. And through your conversations with Mr. Collins, you  
13 learned that Refco, as an entity, had some exposure in the  
14 Sedona investigation, correct?

15 A. That's correct.

16 Q. Meaning it could be asked to pay a penalty, correct?

17 A. Among other things.

18 Q. Meaning it could be found to have engaged in a violation of  
19 the securities laws, correct?

20 A. That's correct.

21 Q. Mr. Collins made that clear to you, correct?

22 MR. CHERNOFF: Objection.

23 THE COURT: Sustained.

24 Q. You discussed that with Mr. Collins, correct?

25 MR. CHERNOFF: Hearsay.

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Westra - cross

1 BY MR. BACH:

2 Q. You discussed that with Mr. Collins?

3 THE COURT: I'm sorry, Mr. Bach.

4 MR. BACH: I asked if he discussed something with  
5 Mr. Collins.

6 THE COURT: And the objection was hearsay.

7 MR. BACH: It goes to Mr. Collins' state of mind.

8 THE COURT: Would you two talk off the record, please,  
9 for a minute.

10 (Counsel conferred)

11 BY MR. BACH:

12 Q. You asked Mr. Collins questions about the Sedona  
13 investigation?

14 A. Yes.

15 Q. And he responded to your questions, correct?

16 A. Yes.

17 Q. And you learned that there were individuals --

18 MR. CHERNOFF: Objection.

19 Q. You learned in the course your due diligence --

20 MR. CHERNOFF: Objection.

21 Q. -- that there were individuals --

22 MR. CHERNOFF: Mr. Bach has just tried to shield. It  
23 calls for hearsay and in the course of due diligence, that is a  
24 problem.

25 THE COURT: Why is this not hearsay?

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Westra - cross

1 MR. BACH: Because this was explored by looking at his  
2 documents in his due diligence. That these were facts --

3 THE COURT: Why is it not hearsay?

4 MR. BACH: I don't see how --

5 MR. CHERNOFF: The documents are also hearsay. I  
6 don't know what the witness has reviewed or what this is about,  
7 but it clearly calls for hearsay.

8 THE COURT: It sounds like it is hearsay.

9 MR. BACH: Can we have a sidebar about it?

10 THE COURT: Oh, sure.

11 MR. BACH: I am engaged in --

12 THE COURT: What? Yes?

13 MR. BACH: Yes.

14 THE COURT: All right. Let's go.

15 (Continued on next page)

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Westra - cross

1 (At the sidebar)

2 MR. BACH: I think I can do this -- I'll try and do it  
3 quickly without getting into the contents of the conversations,  
4 but I do want to show certain conversations occurred. And I'll  
5 try and honor Mr. Chernoff's concerns by not getting into the  
6 content. Although I think all of this goes to Mr. Collins'  
7 state of mind because --

8 THE COURT: But the state of mind can't be that -- I  
9 don't see how you establish through hearsay the fact that there  
10 were certain, let's say, individuals who were going to be  
11 deposed in the Sedona matter and then somehow attribute that  
12 hearsay fact to Mr. Collins.

13 MR. BACH: Because I think the issue --

14 THE COURT: What is it you are asking this witness?

15 MR. BACH: The issue -- I think one of the issues  
16 that's going to come up in this case is whether information was  
17 communicated to Weil, Gotshal about the risks associated with  
18 the Sedona investigation by Mr. Collins or whether they were  
19 misled about it. And I am trying to make clear that there was  
20 an open book between Mr. Collins and Weil Gotshal --

21 THE COURT: But it doesn't matter what you are trying  
22 to make clear. If you are asking for hearsay, you can't do it.

23 MR. BACH: I won't ask about things that were said; I  
24 will just ask if conversations took place.

25 THE COURT: Why is that different?

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Westra - cross

1                   MR. BACH: Because I am not going to elicit anything  
2 that was said. I am just going to elicit events.

3                   THE COURT: Conversations that took place about what?

4                   MR. BACH: About due diligence connected to this  
5 investigation. I am going to say you had a conversation with  
6 Mr. Collins. Documents were provided for your review. I need  
7 to show what the conduct was here.

8                   MR. SCHWARTZ: It is more than that, your Honor. The  
9 argument is if the government is going to make the argument  
10 that he misled him about the Sedona investigation while he was  
11 with Weil, Gotshal, the fact that Weil, Gotshal communicates to  
12 him things that he knows already about the Sedona investigation,  
13 that are the material events about the Sedona investigation,  
14 for example, that individuals are being investigated, that  
15 disproves the government's case that he misled them because he  
16 knew they already knew it. There are things that he doesn't  
17 have to tell them if he hears that they know it. That's not  
18 hearsay.

19                   MR. CHERNOFF: Your Honor, Sedona was not part of this  
20 witness' examination, so I don't know what Mr. --

21                   MR. BACH: It is coming up through his colleague,  
22 Mr. Tabor.

23                   THE COURT: What's that got to do with this guy's  
24 examination?

25                   MR. SCHWARTZ: Because we don't get him back, Judge.

Capdcol3

Westra - cross

1 They are not going to bring him back. And if they are going to  
2 prove through Tabor that Tabor felt misled about material facts  
3 about Sedona, the fact that he and Mr. Collins had  
4 conversations about those very things and Collins could  
5 understand that he already knew things about Sedona through his  
6 due diligence means that there was no misrepresentations.

7 MR. CHERNOFF: Let me cut this short, your Honor, by  
8 saying that if they get into that in connection with Mr. Tabor,  
9 if Mr. Westra has competent evidence on that, we will  
10 absolutely bring him back.

11 THE COURT: All right.

12 MR. CHERNOFF: This discussion of what he learns in  
13 due diligence, he had conversations, he reviewed documents, and  
14 then he knew that it was --

15 MR. BACH: I won't do the and then you knew. We will  
16 preserve our objection, but I am entitled to inquire about  
17 actions he took in the course of his due diligence.

18 THE COURT: What actions were you going to ask him?

19 MR. BACH: Did you review documents? Did you review  
20 correspondence?

21 THE COURT: We already know that.

22 MR. BACH: No, we don't know that.

23 MR. CHERNOFF: Not about Sedona we don't.

24 THE COURT: OK. So you say, did you review documents  
25 and correspondence about Sedona. Then what?

Capdcol3

Westra – cross

MR. BACH: I then am going to ask him did you speak to this person about it, this person about it and this person about it, and then I am done.

THE COURT: All right. If that is what you want, let's go.

(Continued on next page)

Capdcol3

Westra - cross

1 (In open court)

2 THE COURT: Mr. Bach.

3 MR. BACH: Thank you.

4 BY MR. BACH:

5 Q. Mr. Westra, in the course of your due diligence, you  
6 reviewed a correspondence file maintained by Mayer Brown that  
7 included its correspondence with the SEC about the Sedona  
8 investigation, correct?

9 A. Yes.

10 Q. And in addition to speaking to Mr. Collins and Mr. Klejna  
11 about the Sedona investigation, you spoke to Bill McLucas at  
12 Wilmer Cutler law firm about the investigation, correct?

13 A. No.

14 Q. A colleague of yours at the Weil, Gotshal firm spoke to  
15 Mr. McLucas, correct?

16 A. Yes.

17 Q. And you and your colleague Mr. Tabor reported to  
18 Mr. Collins the results of that call, correct?

19 A. I don't recall.

20 Q. The night before the Lee deal closed, you and Jay Tabor  
21 called Joe Collins and related to him the contents of the call  
22 that a Weil, Gotshal partner had with Mr. McLucas at the firm,  
23 correct?

24 A. I don't recall that conversation.

25 Q. You also had a source within the SEC that you contacted for

Capdcol3

Westra - cross

1 information about the Sedona investigation, correct?

2 A. Not to my knowledge.

3 Q. You contacted a former SEC commissioner about the Sedona  
4 investigation, correct?

5 A. Are you referring to the gentleman who was our partner at  
6 Weil, Gotshal?

7 Q. Yes.

8 A. Yes.

9 Q. That is Mr. Sporkin, correct?

10 A. Correct.

11 Q. And your client, TH Lee, had a source within the SEC,  
12 correct?

13 A. Not that I recall.

14 Q. Let me show you what's been marked as Defendant's Exhibit  
15 420.

16 (Pause)

17 This is an e-mail that you sent to your partner Tom  
18 Roberts on June 3, 2004, correct?

19 A. That's correct.

20 MR. BACH: We offer it.

21 A. Pardon me?

22 MR. BACH: We offer it.

23 THE COURT: I'm sorry. I think that is directed to  
24 me.

25 THE WITNESS: I'm sorry.

Capdcol3

Westra - cross

1 MR. CHERNOFF: No objection, your Honor.

2 THE COURT: Received.

3 (Defendant's Exhibit 420 received in evidence)

4 MR. BACH: Can we bring that up? Blow it up.

5 Q. If you look at the top, that is an e-mail that you sent,  
6 correct?

7 A. That's correct.

8 Q. And it's going to Tom Roberts, who is your partner who had  
9 a relationship with Mr. McLucas, correct?

10 A. Correct.

11 Q. And it is also to Jay Tabor, correct?

12 A. That's correct.

13 MR. BACH: And let's blow up the first sentence of the  
14 text.

15 It says: "Lee is getting pretty close with Refco and  
16 we expect to Mon." (Monday). "We have gotten reasonably  
17 comfortable with the SEC inquiry we discussed before in part  
18 because of a source within the SEC Lee was able to access."

19 Do you see that?

20 A. I do.

21 Q. You can bring that down.

22 You also testified, Mr. Westra, that in connection  
23 with your work on this transaction, you reviewed financial  
24 statements prepared by Refco, correct?

25 A. Correct.

Capdcol3

Westra - cross

1 Q. And you looked at some of the footnotes relating to  
2 related-party transactions, correct?

3 A. That's correct.

4 Q. And when you look at footnotes about related-party  
5 transactions, you rely on accountants and outside auditors to  
6 make sure those footnotes are fair and accurate and reported in  
7 accordance with generally accepted accounting principles,  
8 correct?

9 A. That's correct.

10 Q. And your client, Thomas H. Lee, had engaged KPMG, a large  
11 accounting firm, to do accounting due diligence in this case,  
12 correct?

13 A. That's correct.

14 Q. And you knew than they had gotten together with Refco's  
15 accountants, the Grant Thornton firm, to look at the accounting  
16 work that had been done for Refco, correct?

17 A. That's correct.

18 Q. Now, when you talked about how you convened a board meeting  
19 in October 2005, at about the time of Refco's -- news about  
20 Refco became public, correct?

21 A. I didn't convene a meeting. A meeting was convened.

22 Q. A meeting was convened and you attended, correct?

23 A. Correct.

24 Q. Let me show you what's been marked Defense Exhibit 232.

25 (Pause)

CAPPOL4

Westra - cross

1                   THE COURT: Question.

2 BY MR. BACH:

3 Q. Question: This is a draft press release that your firm  
4 circulated in advance of the board meeting, correct?

5 A. This looks like it. Let me just read who the parties are a  
6 moment, please.

7 Q. Sure.

8 A. Yes, that's correct.

9                   MR. BACH: We offer it.

10                  MR. CHERNOFF: No objection.

11                  THE COURT: Received.

12                  (Defendant's Exhibit 232 received in evidence)

13                  MR. BACH: Can we put it up. Blow up the middle  
14 paragraph that says "please find below."

15 Q. Do you see how it refers to a 4:00 board meeting?

16 A. Yes.

17 Q. And then -- and that's on October 9th, correct? If you  
18 look at --

19 A. The middle of the sentence, October 9th, Sunday, yes.

20 Q. And if you go to the next paragraph, it says "Privileged  
21 and confidential, October 9th, 2:27."

22                  What we have here is a draft press release that your  
23 firm has prepared in anticipation of announcing to the public  
24 the problems at Refco, correct?

25 A. That's correct.

CAPPOL4

Westra - cross

1 Q. And, by the way, this draft press release says nothing  
2 about the impact of the problems on Refco's financial  
3 statements, correct?

4 A. I'm sorry, you're asking whether -- I didn't understand the  
5 question, I'm sorry. Repeat that, please?

6 Q. The press release does not articulate any impact of the  
7 problems that have been discovered on Refco's financial  
8 statements, correct?

9 A. Let me just read a moment, please. It states that the  
10 company will likely delay filing its quarterly financial  
11 report, and it goes on to say that it cannot estimate when its  
12 report will be due because the investigation is ongoing.

13 So to answer your question specifically, there is no  
14 specific reference to the effect upon the financial statements,  
15 but there is a clear indication the company's financial  
16 statements are being closely examined, and they may not be  
17 accurate.

18 Q. And what it says is that the date, the schedule is going to  
19 be extended, correct? The financials may not be done?

20 A. It says it cannot state when the filing will be made  
21 because they don't know what statement they will provide.

22 Q. In fact, it wasn't until the 4:00 board meeting that a  
23 determination was going to be made that the events at Refco had  
24 an impact on its financial?

25 A. That's not true at all.

CAPPOL4

Westra - cross

1 Q. When you started working on this trans -- Sir, in press  
2 releases to the public, you have to disclose all material  
3 information?

4 A. That's correct.

5 Q. But you knew that there was going to impact -- If you knew  
6 at the time that there was going to be an impact on Refco's  
7 financial statements, that would have been included in your  
8 firm's press release, correct?

9 A. This press release makes it very clear that the company's  
10 financial statements are going to be in disorder, and we don't  
11 know if we're going to be able to file our 10Q.

12 Q. It says that, but it doesn't say that there is going to be  
13 any material impact on the financial statements, correct?

14 A. I think that anyone who read this press release would  
15 understand that.

16 Q. By the time you got to the -- withdrawn.

17 When you started working on this transaction, you had  
18 already had a career that involved about 30 leveraged buyout  
19 transactions, correct?

20 A. No, I did many more than that.

21 Q. Many more than that. You had been a senior partner in a  
22 law firm, correct?

23 A. Yes.

24 Q. In fact, you were on Weil Gotshal's management committee?

25 MR. CHERNOFF: Can we move this along, your Honor?

CAPPOL4

Westra - cross

1                   THE COURT: Let's go, Mr. Bach, please.

2                   MR. BACH: I'm finishing. I'm done.

3 Q. And you considered -- You had an opportunity to meet and  
4 interact with Mr. Bennett throughout your work, correct?

5 A. Yes, I did.

6 Q. And you considered him to be the most impressive chief  
7 executive officer that you had ever met in your entire career,  
8 until October 2005, correct?

9 A. As I've testified before, I found him to be a very  
10 impressive person, whether he was the most impressive person, I  
11 don't know what I said before, but he was a very, very  
12 impressive CEO.

13                  MR. BACH: Thank you.

14                  THE COURT: Redirect counsel, please?

15                  MR. CHERNOFF: The government waives redirect. Thank  
16 you, your Honor.

17                  THE COURT: Thank you. You may step down, sir.  
18 Counsel, ladies and gentlemen, we'll take a lunch break now.  
19 Would you follow the normal instruction -- I'm going to let the  
20 witness run out ahead.

21                  THE WITNESS: Thank you very much. I appreciate that.

22                  THE COURT: I think he's going to the airplane. Run,  
23 run, run.

24                  Please follow the normal instructions. Please leave  
25 your folders on the chairs, take your pads into the jury room.

CAPPOL4

Westra - cross

1 Don't discuss the case among yourselves. Do not do any  
2 research. Do not get rained on. Please return at 2:15. Enjoy  
3 your lunch. I'll look for a weather report. Thank you, ladies  
4 and gentlemen.

5 (Jury exits)

6 (Luncheon recess)

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CAPPOL4

Westra - cross

## 1 A F T E R N O O N S E S S I O N

2 2:20 P.M.

3 THE COURT: Good afternoon, counsel. May we bring the  
4 jurors in.

5 MR. CHERNOFF: Yes, our witness is, of course, here.

6 THE COURT: Thank you.

7 (Jury enters)

8 THE COURT: Welcome back, ladies and gentlemen. It  
9 didn't look like you got rained on.

10 JUROR: Not at all.

11 THE COURT: Does it look like it's going to rain?

12 JUROR: Yes.

13 JUROR: No.

14 JUROR: What do you mean "looks like"?

15 JUROR: It's damp.

16 THE COURT: That's unattractive. All right. Why  
17 don't you be seated. We continue with the government's case.18 MR. CHERNOFF: Your Honor, the government calls Jay  
19 Tabor.

20 THE COURT: Thank you.

21 RUSSELL JAY TABOR,

22 called as a witness by the Government,

23 having been duly sworn, testified as follows:

24 THE COURT: Mr. Chernoff?

25 MR. CHERNOFF: Thank you, your Honor.

CAPPOL4

Westra - cross

1 DIRECT EXAMINATION

2 BY MR. CHERNOFF:

3 Q. Good afternoon, Mr. Tabor.

4 A. Good afternoon.

5 Q. Sir, what do you do for a living?

6 A. I'm a lawyer.

7 Q. Where did you go to law school?

8 A. Harvard.

9 Q. And prior to that, where did you go to college?

10 A. Oklahoma Christian.

11 Q. What did you major in there?

12 A. I was an American studies major, which is a combination of  
13 history and political science.

14 Q. And what year did you graduate from law school?

15 A. 1990 from law school.

16 Q. What kind of law did you start to practice after you  
17 graduated?

18 A. Corporate, mergers and acquisitions, private equity.

19 Q. And did you spend time at the law firm Weil Gotshal as an  
20 associate lawyer?

21 A. Yes, I did.

22 Q. How many years did you work there as an associate?

23 A. In total, about three-and-a-half years.

24 Q. What office of the Weil firm were you working in?

25 A. The Dallas office.

CAPPOL4

Tabor - direct

1 Q. And did there come a time that you came back to the Weil  
2 firm as a partner in the firm?

3 A. When I actually came back, I was still technically an  
4 associate for about half a year, and then I made partner.

5 Q. And how many years, sir, have you now been a partner at the  
6 Weil firm?

7 A. It will be 14 years as of the end of this year.

8 Q. Do you still work out of the Dallas office?

9 A. I do.

10 Q. What is the primary concentration of your practice there?

11 A. I concentrate really on mergers and acquisitions and  
12 private equity.

13 Q. In your work on mergers and acquisitions and private equity  
14 have you, sir, represented a client called Thomas H. Lee  
15 Partners?

16 A. Yes, I have.

17 Q. When was the first time you represented Thomas H. Lee?

18 A. In 2004.

19 Q. And how did that come about?

20 A. Jim Westra, who was at the time a senior partner in the  
21 firm's Boston office, called me, I believe, in February of 2004  
22 and asked me if I could get involved in a transaction that had  
23 already been going to some extent.

24 Q. And what was the transaction that you were asked to work on  
25 at the time?

CAPPOL4

Tabor - direct

1 A. It was the potential acquisition of Refco by Thomas Lee  
2 Partners.

3 Q. And what form was that acquisition going to take?

4 A. Well, it was going to be a leveraged buyout, as we call it.

5 Q. And did you work on the leveraged buyout at Refco until it  
6 was completed?

7 A. Yes.

8 Q. What was your role as a partner in the firm working on this  
9 transaction?

10 A. Well, I would say I was the primary day-to-day partner.

11 Jim Westra was the senior, very strategic guy. When there were  
12 big strategic decisions to be made, he participated. He  
13 participated in some key negotiations. I was the guy who,  
14 day-to-day, did the partner work necessary to get the deal  
15 done.

16 Q. And in doing that work, did you participate in the due  
17 diligence the firm did?

18 A. Yes, I did.

19 Q. And did you also participate in negotiating the various  
20 contracts and letters that were entered into between Refco and  
21 Thomas H. Lee?

22 A. Yes, I did.

23 Q. Was Refco represented by a law firm in connection with  
24 these events and transaction?

25 A. Yes.

CAPPOL4

Tabor - direct

1 Q. Which firm?

2 A. Mayer Brown.

3 Q. And who was the lead lawyer for Mayer Brown in charge of  
4 the representation?

5 A. It was Joe Collins.

6 Q. Did you interact with Mr. Collins?

7 A. Yes.

8 Q. Did you communicate with him by phone?

9 A. Yes.

10 Q. And by e-mail?

11 A. Yes.

12 Q. And did you meet with him in person?

13 A. On occasion, yes.

14 Q. Based on your interactions with Mr. Collins, how would you  
15 describe his role beyond the leader of the team for Mayer  
16 Brown?

17 A. Well, in addition to being the leader of the team, sort of  
18 the Jim Westra role, I would say he also played, at least early  
19 on in the transaction, the day-to-day lead partner role, sort  
20 of like I did, up through the time that we signed the letter of  
21 intent when he brought some other partners in to help.

22 Q. And did you come to develop an understanding as to  
23 Mr. Collins' relationship with his client, Refco?

24 A. Yes. My understanding was he had worked for quite a few  
25 years for Refco and had done a bunch of things for them; so he

CAPPOL4

Tabor - direct

1 was very familiar with Refco.

2 Q. And, by the way, did you interact with other lawyers from  
3 Mayer Brown in the course of this work that you can recall?

4 A. I did. Not at first, but once we got to the letter of  
5 intent stage and were trying to negotiate the final agreement,  
6 I did interact with some others.

7 Q. Who do you recall working with from Mayer Brown on this  
8 deal?

9 A. Angela Lang was a partner who was brought in, and I think  
10 Gail Saracco also.

11 Q. And do you have an understanding of what the specialty of  
12 Ms. Lang was?

13 A. I believe she was a mergers and acquisitions lawyer.

14 Q. And Miss Saracco?

15 A. I believe the same.

16 Q. And so how would you compare Mr. Collins' role in the  
17 transactions to Ms. Lang and Ms. Saracco's?

18 A. Well, early on in the transaction, he was the -- as far as  
19 I could tell, the sole Mayer Brown partner who was involved.  
20 So he was doing day-to-day stuff, as well as more strategic  
21 stuff.

22 Once we actually had a letter of intent signed and  
23 were working to sign the definitive contract, I would say he  
24 stepped into more of a strategic role, and Ms. Lang and  
25 Ms. Saracco did more of the day-to-day work in terms of trying

CAPPOL4

Tabor - direct

1 to hammer out the actual terms of the agreement.

2 Q. Now, based on your observations of Mr. Collins at work,  
3 would you say that he had a hands-on or a hands-off style of  
4 work?

5 A. I'd say he was very hands on, which we knew was helpful in  
6 trying to get this deal done.

7 Q. And were there other lawyers for Refco, outside of the  
8 Mayer Brown attorneys, who had some involvement in this  
9 transaction?

10 A. There was. The company's in-house general counsel, Dennis  
11 Klejna, was involved in some pieces of it.

12 Q. What kind of pieces was Mr. Klejna involved in?

13 A. It was primarily two things that I recall. One was  
14 regulatory matters in terms of we were doing diligence on Refco  
15 with respect to various regulatory proceedings they'd been  
16 involved with over the years.

17 Back in the 1990s, there had been a bunch of fines and  
18 so forth that they paid. Mr. Klejna had been brought in and,  
19 as far as we could tell, was attempting to clean up a lot of  
20 the regulatory stuff. So we were working with him to do  
21 diligence on the regulatory matters that the company had been  
22 subject to. So that was one step -- or one piece, rather.

23 The other piece, I would say once we had a deal signed  
24 and were moving towards closing, there were a number of  
25 regulatory approvals that had to be obtained in various

CAPPOL4

Tabor - direct

1 jurisdictions, and Mr. Klejna was very involved in that as  
2 well.

3 Q. So how did Mr. Klejna's role contrast with Mr. Collins?

4 A. I would say Mr. Collins was much more of the deal lawyer,  
5 and Mr. Klejna was consulted on specific diligence pieces and  
6 on overall regulatory pieces.

7 Q. Now, did you also interact with executives from Refco in  
8 connection with your work on this transaction?

9 A. I did some, yes.

10 Q. Who do you recall?

11 A. Phillip Bennett, Robert Trosten.

12 Q. And they were the CEO and the CFO respectively?

13 A. That's correct.

14 Q. What was Mr. Bennett's role?

15 A. He was, I would say, the lead person driving the  
16 transaction from a business standpoint, and he was very hands  
17 on, as well, I would say.

18 Q. And Mr. Trosten's role?

19 A. He was, as you said, the chief financial officer, and I  
20 dealt less with him. There were some diligence matters and  
21 diligence calls that I know that he was on that I was on. I  
22 don't believe I ever met him personally, that I can recall at  
23 least. That's why I dealt with him somewhat less.

24 Q. Now, let me direct your attention to when you first were  
25 asked by Mr. Westra to work on this transaction. When,

CAPPOL4

Tabor - direct

1 approximately, was it that you got involved?

2 A. Sometime in February of 2004.

3 Q. And when you began working on this transaction, were other  
4 Weil lawyers already assigned to it, or let me say and other  
5 Weil lawyers were already working on it?

6 A. Yes.

7 Q. Do you remember roughly how many lawyers and what they were  
8 doing at that point in time?

9 A. Well, it was a handful. I don't remember exactly how many,  
10 but we had associates who were physically visiting the data  
11 room that had been put together in New York, and they were  
12 doing diligence review in that data room.

13 Q. We've heard a little bit in this trial about a data room,  
14 but what do you mean by that term?

15 A. Well, it's -- or at least this one was a physical room  
16 where a bunch of documents relating to Refco were put in the  
17 room and organized under various headings in order for  
18 potential buyers and their advisers to be able to come in and  
19 start reviewing things.

20 Q. And so what were the Weil attorneys, the associate lawyers,  
21 doing when they visited this data room?

22 A. They were reviewing various documents. The type of  
23 documents that fall into the legal diligence category, they  
24 were looking at.

25 Q. And are there other types of due diligence that were being

CAPPOL4

Tabor - direct

1 done?

2 A. I don't know specifically at this point in time whether  
3 they were being done, but in this transaction in general, yes.

4 Q. What were the other types that came to be done on this?

5 A. Accounting diligence, there's benefits, employee benefits  
6 diligence, there's tax diligence, and then what I call just  
7 general business diligence.

8 Q. And do you remember some of the accountants or other firms  
9 that were involved in those aspects of diligence?

10 A. Well, KPMG was involved definitely on the accounting side,  
11 and I believe they were also involved on some regulatory  
12 capital issues and things like that for this business. I  
13 believe Mercer was involved in the benefits side. KPMG was  
14 also involved in the tax side, I believe. There may have been  
15 others.

16 Q. And do these other firms that are doing other sorts of  
17 diligence also make use of the data room?

18 A. In some cases, yes. I don't recall specifically whether  
19 there was a lot of accounting and tax stuff in this data room  
20 or not.

21 Q. Who decides what is in the data room?

22 A. Well, it's generally put together by a team on behalf of  
23 the seller. Usually involving bankers, business people,  
24 sometimes lawyers that assemble things that they think will be  
25 helpful to a potential buyer.

CAPPOL4

Tabor - direct

1 Q. And is it fair to say that some of the point of going to  
2 the data room is to find out what might be missing?

3 A. Well, I think the review was in the data room, and that  
4 doesn't necessarily tell you what's missing. That's why after  
5 you review that, go ask questions to figure out if there are  
6 other things that are applicable.

7 Q. And is that what the Weil attorneys who were doing due  
8 diligence when you joined were seeking to do?

9 A. Yes, they were reviewing what was in the data room.

10 Q. Mr. Tabor, let me ask you about -- there's a stack of  
11 documents I'm going to be asking you about there in front of  
12 you, and on top I think should be Government Exhibit 179. Do  
13 you have that?

14 A. I see it, yes.

15 MR. CHERNOFF: And can we bring it up, Mr. Smith?

16 Q. Now, Mr. Tabor, do you see at the footer of this  
17 document -- First of all, there's some Bates numbers that  
18 appear to reflect this was a document produced from the Weil  
19 Gotshal & Manges law firm files?

20 A. I see the WGM down there, if that's what that means.

21 Q. And then in the actual document footer, there is the name  
22 Gewirtz. Was there a Mr. or Ms. Gewirtz working on this  
23 transaction?

24 A. Yes, there was. Dan Gewirtz, at this point in time really  
25 was the senior corporate associate working on the transaction.

CAPPOL4

Tabor - direct

1                   MR. CHERNOFF: Let me ask Mr. Smith to take us up to  
2 the top of the first page.

3 Q. You see there again the initials of the firm next to the  
4 word "draft"?

5 A. I do.

6 Q. And the date of February 20th, 2004?

7 A. I do.

8 Q. This says, "Project Royce, open diligence issues."

9                   Project Royce was the code name for this particular  
10 potential deal?

11 A. Yes.

12 Q. Mr. Tabor, prior to the collapse of Refco, do you remember  
13 ever receiving Mr. Gewirtz's draft that we see on the screen?

14 A. No, I do not.

15                   MR. CHERNOFF: Let me ask Mr. Smith if we could flip  
16 to the next page, towards the bottom, paragraph 12.

17 Q. Mr. Tabor, there's a reference here to minor points to keep  
18 track of, and then there are five items. Do you see those?

19 A. I do.

20 Q. Now, Mr. Tabor, in the time since the collapse of Refco,  
21 fair to say you've heard a lot about the Proceeds Participation  
22 Agreement?

23 A. Well, I didn't hear about it until years after the collapse  
24 of Refco, but yes, eventually I did.

25 Q. Now, here there's a reference in (e) to a copy of the

CAPPCOL4

## Tabor - direct

1      Proceeds Participation Agreement between Refco Group, Limited,  
2      LLC, and DF Capital, Inc.; do you see that?

3 A. Yes, I see it.

4 Q. Do you recall at any time in your work on this transaction  
5 an attorney for Weil asking you or bringing to your attention  
6 that there was a Proceeds Participation Agreement?

7 A. No, I do not.

8 Q. And do you remember anyone sharing with you a conclusion  
9 that this was only a minor point to keep track of?

10 A. No, I do not.

11 Q. Let me ask you now to take a look at Government  
12 Exhibit 180, which should be next in the pile there?

13 A. Okay. I see it.

14 Q. And look at the lower right-hand corner. Do you see the  
15 initials WGM again?

16 A. Yes.

17 Q. And the other footer refers to notes on a certain subject?

18 A. Yes, notes on Refco Group, Limited.

19 MR. CHERNOFF: Your Honor, the government offers 180.

20 MR. SCHWARTZ: No objection.

21 || THE COURT: Received.

22 (Government's Exhibit 180 received in evidence)

23 Q. And so, Mr. Tabor, if you could take a look at this  
24 document, is it fair to say this document is undated? It's two  
25 pages.

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Tabor - direct

1 A. Yes, I don't see a date on it.

2 Q. Prior to the collapse of Refco, do you remember ever seeing  
3 this document?

4 A. No.

5 Q. What does this appear to be, as you look at it, based on  
6 your understanding of the Refco Group, Limited?

7 A. It appears to be a description of terms in a limited  
8 liability company agreement, or at least a draft of it.

9 Q. You use the term limited liability agreement -- or limited  
10 liability company agreement, I meant to say. Also known as an  
11 LLC agreement?

12 A. Yes.

13 Q. What is that, sir?

14 A. When the entity that's involved is a limited liability  
15 company, or an LLC, the LLC agreement is the basic governing  
16 document. It's kind of like that's the constitution of the  
17 entity that governs the rights and the obligations of the  
18 owners.

19 Q. Now, as we look at the outline here, if we could move to  
20 the, I guess, second hollow bullet point there beginning  
21 "Company and holders," and it says, "Company and holder of  
22 voting membership shares not allowed to vote to permit company  
23 to issue any new shares of any class, except as contemplated by  
24 Proceeds Participation Agreement dated as of July 12, 2002,  
25 between company and DF Capital, Inc." And then in parenthesis

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Tabor - direct

1 in italics, "Get copy of?"

2 Mr. Tabor, did anyone ever ask you whether you needed  
3 to get a copy of the Proceeds Participation Agreement?

4 A. No.

5 Q. And based on what we've now looked at on this document, do  
6 you have any better idea of who it was that created this  
7 document or how it came to be in the Weil files?

8 A. I can only assume it was some Weil associate that did this.  
9 I don't know for sure which one.

10 Q. And so at any time in the due diligence, did anyone bring  
11 to your attention that there may have been language in the LLC  
12 agreement concerning a Proceeds Participation Agreement?

13 A. I want to be sure I understand one thing. When you say the  
14 LLC agreement, if I understood you correctly, my understanding  
15 was we never saw in the data room anything that purported to be  
16 an executed LLC agreement, that we did see a draft of  
17 something.

18 Q. So let me ask you about that. You said you were trying to  
19 get a copy of the LLC agreement?

20 A. That's right.

21 Q. And what was your understanding of what was available to  
22 you at the outset of your efforts?

23 A. Well, there was something in the data room -- When I say  
24 available to us, I don't believe we were allowed to make copies  
25 or anything like that, but there was something in the data room

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Tabor - direct

1 that was described to me as an unsigned draft, I guess, or an  
2 unsigned version of an LLC agreement that did not appear to be  
3 the one that was actually being operated under.

4 It had some wrong parties in it. It had some wrong  
5 manager; so it didn't appear to be the actual LLC agreement.

6 Q. And so when you learned that the LLC agreement that was  
7 being made available was unsigned and apparently incorrect, did  
8 you ask that anything be done about that?

9 A. Yes, we asked to receive whatever was the actual LLC  
10 agreement that the company had been operating under.

11 Q. And do you remember who your requests were directed to?

12 A. Well, this -- at a later point in the process, when we were  
13 moving towards signing a definitive agreement, the conversation  
14 was directed with Mr. Collins.

15 Q. And did Mr. Collins eventually provide you with an LLC  
16 agreement --

17 A. Yes.

18 Q. -- that purported to be the one in effect?

19 A. Yes.

20 Q. Did that LLC agreement that he provided you make any  
21 reference to the Proceeds Participation Agreement that we see  
22 here in this document?

23 A. No, it did not.

24 Q. And so coming back to -- I'll ask you more about that  
25 later, but coming back to Government Exhibit 180, does this

CAPPOL4

Tabor - direct

1 outline reveal to you which -- Let me back up.

2 The LLC agreements were amended from time to time?

3 A. That's my understanding, yes.

4 Q. And then they're given numbers, third, fourth, fifth?

5 A. That's typical.

6 Q. This outline doesn't tell us, I gather, which one it's  
7 referring to?

8 A. That's right.

9 Q. All right. We can -- We'll come back to the LLC agreement  
10 later, but we can put that aside.

11 We've just been talking about references in two  
12 documents that I've shown you to a Proceeds Participation  
13 Agreement. Does that term, in and of itself, have any  
14 significance to you? Is that a standard kind of agreement?

15 A. I had never heard of a proceed -- anything called a proceed  
16 participation agreement up to the time I was working on Refco,  
17 nor since have I ever seen anything called that in any other  
18 deals I've ever worked on.

19 Q. You later said learned about the Proceeds Participation  
20 Agreement after the collapse of Refco?

21 A. Yes.

22 Q. How did you first learn about it?

23 A. I was asked questions about it in an interview that the  
24 examiner did.

25 Q. And you were shown it at that time?

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Tabor - direct

1 A. I was.

2 Q. Who was the examiner who was interviewing you?

3 A. They were lawyers who were working for the examiner. I  
4 don't recall who they were.

5 Q. What do you mean by "the examiner"?

6 A. My understanding, this is very general and not firsthand,  
7 was that there was an examiner that was appointed to look at a  
8 bunch of things surrounding the collapse of Refco, and that  
9 examiner hired lawyers and other professionals to do that.

10 Q. Going back to the legal due diligence, what were the other  
11 principal areas of contracts or legal matters that you were  
12 trying to get answers to, find out about in legal due  
13 diligence?

14 A. Well, there are a number of categories. In legal diligence  
15 we look at litigation the company may be party to, to try to  
16 figure out if there are things that are problematic there. We  
17 look at certain regulatory matters, and then we look at  
18 contracts, a number of different kinds of contracts. But  
19 basically what we're focused on in legal diligence is material  
20 contracts.

21 MR. SCHWARTZ: Your Honor, is he going to be  
22 testifying about this case or about his general practices?

23 MR. CHERNOFF: Mr. Tabor, I'll ask you to focus your  
24 questions on just what you were looking for, as you recall it,  
25 in the legal due diligence in relation to this particular

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Tabor - direct

1 transaction.

2 A. Okay. The things I've mentioned so far we were looking for  
3 in this particular transaction. With respect to contracts, we  
4 were looking for what I've referred to as material contracts  
5 because a company like Refco can have thousands and thousands  
6 of contracts, and the lawyers doing diligence typically don't  
7 look at every single one, or we didn't look at every single  
8 one. I apologize.

9 MR. SCHWARTZ: Your Honor?

10 THE COURT: All right.

11 MR. SCHWARTZ: Same objection.

12 A. We did not look at every -- attempt to look at every single  
13 contract. What we did want to do was identify what were the  
14 important or material contracts and those can fall into a  
15 number of categories. If there are any sort of contracts or  
16 arrangements with related parties, affiliates of the company,  
17 those we viewed as material regardless of how big they were,  
18 and we asked for all of them.

19 We also, beyond that, asked for and wanted to review  
20 any contracts that related essentially to the ownership of this  
21 company, who owns it and what their rights are. Beyond that,  
22 there were -- we attempted to prioritize by what was really  
23 important.

24 We asked the company what they thought were their  
25 important contracts. We asked representatives of the company

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Tabor - direct

1 to identify those for us, and then ultimately, in the purchase  
2 agreement that we negotiated, we got representations as to  
3 particular categories.

4 For instance, if there was any contract that required  
5 for a payment to be made that was more than \$5 million, then  
6 that, by definition, was material and had to be listed and  
7 shown to us. That's just one example.

8 Q. And, Mr. Tabor, when you mentioned the purchase agreement,  
9 was that the full name of that, the equity purchase and merger  
10 agreement?

11 A. That's correct, yes.

12 Q. And so we've been calling that the EPMA in this trial. I  
13 may use that term to reference it.

14 A. Okay.

15 Q. So you said that you were interested in finding out about  
16 any contracts between related parties. What do you mean by  
17 related parties? What were you looking at?

18 A. Well, that would be contracts between Refco on the one hand  
19 and people who controlled Refco or their affiliates on the  
20 other hand.

21 Q. And when you say the people who controlled Refco, do you  
22 mean the owners?

23 A. Yes.

24 Q. What did you understand was the ownership of Refco at the  
25 point that you joined the transaction?

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Tabor - direct

1 A. We understood that 90 percent of it was owned by an entity  
2 called RGHI and 10 percent was owned by this entity we called  
3 BAWAG, that was a subsidiary of an Austrian bank.

4 Q. And what about the ownership of RGHI, who owned that?

5 A. Our understanding was it was 50 percent owned by Phil  
6 Bennett and 50 percent owned by Tone Grant.

7 Q. And let me just ask Mr. Smith if we quickly bring up  
8 Government Exhibit 815, and take a look at that, Mr. Tabor.

9 Does that represent the ownership structure as you understood  
10 it and as you described it?

11 A. Yes, this is what we understood.

12 Q. At any time in doing your due diligence, did you learn  
13 anything about another interest that BAWAG had in Refco and its  
14 equity?

15 A. No, we did not.

16 Q. And did you, yourself, from anyone during your due  
17 diligence learn about an ownership interest about something  
18 called the Desana Foundation?

19 A. No.

20 Q. Or DF Capital?

21 A. No.

22 MR. CHERNOFF: Thank you, Mr. Smith.

23 Q. So you said that there were attorneys from Weil in the data  
24 room focusing on what else needed to be asked for, and I'm  
25 focusing on, I guess, in the time period -- Well, what was the

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Tabor - direct

1 time period where the data room was still being assessed, if  
2 you know?

3 A. People were active in the data room in February, maybe  
4 going into the early part of March; that by that time, I  
5 believe we had reviewed essentially what was in the data room  
6 from the legal perspective.

7 Q. And had the Weil team identified additional topics or  
8 additional things it wanted to receive?

9 A. Well, additional things to receive and also additional  
10 things to ask questions about as to whether they were  
11 applicable or not here.

12 Q. And so who in that time period were these questions  
13 addressed to?

14 A. I think early on in the time period, we were still routing  
15 questions through CSFB, the investment banker for Refco.

16 Q. When you say early on in the time period, what do you have  
17 in mind?

18 A. I mean in February, the first part of March, I believe we  
19 were doing that.

20 Q. And did that change?

21 A. It did eventually, yes.

22 Q. How so?

23 A. Well, as we were getting later in March, we attempted to  
24 route some questions to the company and to Mr. Collins to  
25 determine sort of what might be missing in the data room and

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Tabor - direct

1 whether there were other major categories of things they were  
2 going to have to be reviewing.

3 Q. And when did that start happening?

4 A. Well, it was --

5 Q. Roughly speaking?

6 A. Well, certainly in the last ten days or so of March we were  
7 attempting to set up a conference or a call with Refco  
8 management to go through some of those questions.

9 Q. And, Mr. Tabor, focusing on the period March 2004, do you  
10 recall speaking to any representatives of Refco or the counsel  
11 for Refco regarding due diligence requests?

12 A. Yes.

13 Q. Who do you remember speaking to in the month of March?

14 A. Well, there were two different conversations. Which one  
15 are you referring to?

16 Q. Let's take the first one. And I'll call that the first  
17 March due diligence call, and I'll call the other one the  
18 second March due diligence call.

19 A. Okay. The first March due diligence call was between me  
20 and Mr. Collins.

21 Q. And the second?

22 A. It was a broader group. It included certainly me, but  
23 Mr. Bennett, Mr. Trosten, I believe, Mr. Klejna, and I believe  
24 Mr. Collins; although I can't say so with a hundred percent  
25 certainty.

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Tabor - direct

1 Q. Let me ask you about the first due diligence call in more  
2 specific detail. You said that was a call between yourself and  
3 Mr. Collins?

4 A. That's right.

5 Q. And what date are you able to fix on that call?

6 A. I believe it was the 23rd of March. I can't be one hundred  
7 percent positive that it was 23rd versus 20-something, right  
8 around that, but I believe it's the 23rd.

9 Q. And what did you review or consider in reaching the  
10 conclusion that it was March 23rd?

11 A. Well, I made notes of the conversation.

12 Q. And were those notes dated?

13 A. Yes.

14 Q. With what date?

15 A. It appears to be March 23. It's definitely  
16 March 20-something, and I believe it's 23rd.

17 Q. You said that you took notes of those -- of both those  
18 calls, but I'm going to ask you about the notes of the first  
19 call.

20 A. Okay.

21 Q. But am I correct you took notes on both of them?

22 A. Yes, that's correct.

23 Q. Did you, by the way, date the note of the second March due  
24 diligence call?

25 A. I did.

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Tabor - direct

1 Q. What was the date -- and referring to your notes, what date  
2 did you affix to that?

3 A. That was March 30th.

4 Q. Let me pause before I ask you more about your notes in  
5 particular, and ask you about your note-taking practices.

6 How is it that you take notes when you're working on a  
7 deal like the one we have here?

8 A. Well, I would say my practices are inconsistent because my  
9 notes, when I take them, are just for my own benefit, to help  
10 me remember things when I feel like it's helpful. There's a  
11 lot of scribbling, a lot of short-handing, and I sometimes take  
12 sort of stream-of-consciousness notes some days, also, which  
13 looking back on years later, are difficult to make much out of.  
14 So there's really not a particular practice that I use, I  
15 suppose.

16 Q. And do you take notes during meetings or conversations or  
17 jot them down afterwards?

18 A. Well, generally, if I'm going to take notes of a  
19 conversation, I do it when the conversation is going on, and  
20 that certainly was the case with respect to these two.

21 Q. And is there any sort of rhyme or reason as to when you  
22 take notes and when you don't?

23 A. Just when I think it's helpful for me. Once again, the  
24 notes are just for me, not for anybody else.

25 Q. And do you generally date all your notes or are they mostly

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Tabor - direct

1 undated?

2 A. I would say they're mostly undated.

3 Q. So how is it you keep track of the notes, if you do, when  
4 you're working on transactions?

5 A. Once again, they're just for my own benefit. So if I feel  
6 like I need to date something, I do. If not, if I don't feel  
7 that I need to, I don't. It's just for my own benefit.

8 Q. Is there any other way that you sort of physically keep  
9 track of them so they're in some kind of order?

10 A. Well, yeah. What I -- Yes. What I typically do is take  
11 notes in a legal pad and, for the most part, I'll start with  
12 one legal pad, and I'll fill it up, and I'll move on to the  
13 next. Then after it's filled up, I may not be one hundred  
14 percent consistent with that, but that's generally what I do.

15 Q. And so you mean you have one legal pad per deal?

16 A. Well, no. Typically there are several. I start out with  
17 one. It gets filled up. Whenever it gets filled up, then I  
18 usually start another, and so on.

19 Q. Until?

20 A. Until the deal's done.

21 Q. And so when you travel, do you carry the notebook for any  
22 deal you're working on with you or --

23 A. I do. If I think there's a realistic possibility I may be  
24 doing something on a particular deal, I bring the note pad for  
25 that deal with me.

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Tabor - direct

1 Q. Mr. Tabor, I'm going to walk up a document and ask you to  
2 take a look at what's been marked as Government Exhibit 781.  
3 That's 781, if I didn't say it.

4 A. Okay.

5 Q. Do you recognize 781?

6 A. Yes.

7 Q. What do you recognize it to be?

8 A. A book of my Refco notes.

9 MR. CHERNOFF: Your Honor, the government offers 781.

10 MR. SCHWARTZ: No objection.

11 THE COURT: Received.

12 (Government's Exhibit 781 received in evidence)

13 Q. And so if you could just hold up the documents in front of  
14 you. Is that your original set of notes?

15 A. Yes, these are the originals.

16 Q. And is this the first book in the series of books that  
17 you -- I'm using the term book, but let me back up. You said  
18 it was a legal pad?

19 A. Right.

20 Q. Could you hold that up again? Is this the first of the  
21 pads that you filled up in connection with your work on the  
22 Refco deal?

23 A. Yes.

24 Q. Okay. I'm going to ask you to turn to -- Did you have a  
25 chance to look at these before you testified today?

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Tabor - direct

1 A. Yes.

2 Q. And did you place certain tabs on them relative to the  
3 testimony that you're going to be asked to give?

4 A. Yes.

5 Q. I think if you flip to Tab A?

6 A. Okay.

7 Q. Does that page in the pad correspond to any of the subjects  
8 we've been discussing?

9 A. Yes. These are the notes from the first March  
10 conversation, the one with Mr. Collins.

11 MR. CHERNOFF: And, Mr. Smith, it's Bates No. 85.

12 Q. Okay. No offense, Mr. Tabor, but fair to say we'll need  
13 your help reading some of these notes?

14 A. My mother was a third grade teacher, and she thinks she  
15 failed. But they are a little messy, I admit.

16 Q. We see up in the left-hand corner the date that you made  
17 reference to?

18 A. Yes.

19 Q. And you said you thought it said March 23rd, '04?

20 A. Yes.

21 Q. Is there something else you think it might also say?

22 A. It's March 20-something for sure, and I think that's three.

23 Q. And so I'm going to ask you questions now about this  
24 conversation, which I'm calling the first March due diligence  
25 call, the call you had with Mr. Collins. And to the extent you

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Tabor - direct

1 need to make reference to the exhibit, to the notes, let me  
2 know that you need to do that before answering, or otherwise,  
3 just answer my questions as you recollect the matters I'll be  
4 asking about.

5 A. Okay.

6 Q. And by the way, did you take these particular notes during  
7 the telephone conference with Mr. Collins, or did you jot them  
8 down afterwards?

9 A. No, I took these during the call.

10 Q. Why were you speaking to Mr. Collins on March 23rd, 2004?

11 A. Well, as we got into the last part of March, we had long  
12 since finished the review of the diligence materials in the  
13 data room. We were still doing some work, but the client was  
14 trying to figure out whether it was really going to go forward  
15 with this deal, and one thing they wanted us to do was to  
16 figure out how much diligence work we really had left to do if  
17 they wanted to go forward.

18 So we were attempting to arrange a call with the  
19 management of Refco to go through various categories, to see if  
20 things were applicable that we didn't have or to see if those  
21 things weren't applicable and we would not have diligence to do  
22 on them.

23 We were trying to set that up a variety of ways, we  
24 asked the banker, CSFB, to set it up. I think our client was  
25 trying to set it up, and I spoke with Mr. Collins with the idea

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Tabor - direct

1 of trying to push that forward and helping us set that up, and  
2 also helping us get some more information also.

3 Q. And how did the conversation go? What did you say to him  
4 and what did he say to you, if you recollect?

5 A. I don't recall what the first words were. I do recall that  
6 I brought up the general subject, and Mr. Collins said that he  
7 would push to try to get us responses to the diligence  
8 questions that we had.

9 Q. What was discussed next?

10 A. We talked about a number of specific categories of  
11 diligence, particularly things relating to contract matters.  
12 The first category that I recall was debt, and actually,  
13 really, two types. The first was debt that Refco might owe to  
14 third parties, and so I asked him whether there was such debt  
15 that was not already in the data room.

16 And I recall that he responded that he was essentially  
17 certain that there was no other debt not in the data room, but  
18 he would confirm.

19 MR. CHERNOFF: And, Mr. Smith, we can take down the  
20 exhibit, unless Mr. Tabor wants to make reference to it. Thank  
21 you.

22 Q. So Mr. Collins said he would find out whether there was any  
23 other debt that wasn't in the data room?

24 A. Right, that he was -- as I recall, said he was essentially  
25 certain that there wasn't any.

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Tabor - direct

1 Q. And why were you asking Mr. Collins about that particular  
2 subject?

3 A. One of the things we wanted to know in this deal, as part  
4 of our legal diligence, is what the company owed to others in  
5 terms of debt. And our client, from a business perspective,  
6 wanted to know it also.

7 Q. You said you wanted to know what money the company owed to  
8 others, and did you also want to know what money the company  
9 might be owed?

10 A. Yes, and that was really the second question I asked him,  
11 and that was --

12 Q. Please, go ahead.

13 A. -- was debt that other people owed to Refco. So where  
14 Refco was owed money by others, and I recall that he confirmed  
15 that the only debt owed to Refco was ordinary customer  
16 receivables arising in the ordinary course, and that this had  
17 been gone through between the company and the accountants.

18 MR. CHERNOFF: May I have a moment, your Honor?

19 THE COURT: Yes, sir.

20 Q. You said that you were concerned about debt owed to Refco.  
21 What particular concerns did you have about debt owed to Refco  
22 as you were doing due diligence?

23 A. Well, we just needed to understand what it was, really, to  
24 help our client make sure that their valuation of this company  
25 was proper. We would need to understand how much it was, who

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Tabor - direct

1 it was owed by.

2 So whether -- you know, if it was owed by an  
3 affiliate, a related party, for instance, that would be  
4 something we would be more sensitive to than if it was owed by,  
5 you know, General Electric to this company.

6 Q. And why were you more interested in finding out in  
7 particular about a related-party debt to Refco?

8 A. Any kind of related-party transaction was something that we  
9 wanted to know about, regardless of the size. Are you asking  
10 me why that is?

11 Q. Why that was in this deal?

12 MR. SCHWARTZ: Objection.

13 THE COURT: Why that was in this deal? Is that the  
14 same objection?

15 MR. SCHWARTZ: Yes, your Honor. You're familiar with  
16 the objection.

17 THE COURT: Overruled. You may answer, sir.

18 THE WITNESS: Okay.

19 MR. SCHWARTZ: And we're familiar with the ruling.

20 A. In this deal, we were concerned about related-party  
21 transactions primarily for two reasons. One, if something's  
22 with a related party, the concern in this case, rather, was  
23 that it might not be an on an arm's-length basis.

24 So it could either be the case that the transaction  
25 was unfair to Refco, so essentially it's cheating Refco or

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Tabor - direct

1 sucking value out of Refco. The other possibility would be  
2 that it was too favorable to Refco, in order to prop up Refco  
3 to make it look better than it actually was.

4 So those were the reasons that anything with related  
5 parties, we were really focused on, be it debt or otherwise.  
6 But in this case I would say this question related to any debt,  
7 whether it was owed by unrelated parties or not.

8 Q. And at this time, had you been made aware of any  
9 related-party debt from RGHI to Refco?

10 A. Yes. We knew about one piece of related-party debt that I  
11 believe was a little over a hundred million dollars that was  
12 owed by RGHI. It was in the CSFB reports. I think it was in  
13 the financials; so everybody knew about it.

14 Q. And that's all you were told about with respect to  
15 related-party debt?

16 A. That's right.

17 Q. And so you said Mr. Collins said there was no debt owed to  
18 Refco other than what is owed or was owed by Refco customers?

19 A. That's right.

20 Q. What did you understand that to mean?

21 A. Just they're customer accounts receivable or receivables  
22 arising in the ordinary course.

23 Q. What else were you -- What else did you inquire about of  
24 Mr. Collins in this call?

25 A. Well, I asked him about stock options or similar items,

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Tabor - direct

1 which would be basically any right that somebody has to get an  
2 ownership interest in this company, if they could get stock or  
3 equity in this company by a contract, an option or otherwise.

4 So I asked him if there were any of those.

5 Q. And why were you asking Mr. Collins about that?

6 A. Well, from a legal perspective, we needed to be able to  
7 confirm the ownership of this company, know who owned it, to be  
8 sure that our client was going to get the ownership percentage  
9 that it had bargained for.

10 And to the extent there were any contracts under which  
11 somebody else had the right to get an interest, we would  
12 certainly want to understand those economics, or our client  
13 would. We would need to be able to explain the economics to  
14 our client.

15 Q. And after you asked Mr. Collins whether there was any  
16 entity that had the options to acquire equity in Refco, what  
17 did he tell you?

18 A. He said Mr. Bennett confirmed that there were none.

19 Q. Did Mr. Collins tell you then, or at any point, that a  
20 BAWAG-related entity called DF Capital had an option to convert  
21 an interest in the proceeds of a Refco sale into actual equity  
22 in the company?

23 A. No.

24 Q. Was anything like that mentioned to you?

25 A. No, it was not.

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Tabor - direct

1 Q. Mr. Tabor, I think you said, by the way, that Mr. Collins  
2 was representing Refco in connection with this leveraged  
3 buyout, correct?

4 A. Yes.

5 Q. What about Phil Bennett, the CEO, did he personally have  
6 representation?

7 A. I understood that Mr. Collins was representing him also.

8 Q. And what about RGHI, did RGHI have a lawyer?

9 A. My understanding was that Mr. Collins was representing  
10 RGHI.

11 Q. In this first March due diligence call, did you and  
12 Mr. Collins also talk about any agreements or arrangements that  
13 Refco had in particular with Mr. Bennett?

14 A. Yes, with Mr. Bennett or RGHI or other affiliates of Refco  
15 or of Mr. Bennett or RGHI. So this really goes back to the  
16 related-party question I mentioned a minute ago. I asked a  
17 specific question about that.

18 Q. And what were you told?

19 A. As I recall, Mr. Collins said he had confirmed with  
20 Mr. Bennett that there were not any such relationships other  
21 than Mr. Bennett's compensation that he got in the ordinary  
22 course.

23 Q. And, again, let me ask you why you were posing those  
24 particular questions?

25 MR. SCHWARTZ: Objection.

CAPPOL4

Tabor - direct

1                   THE COURT: Overruled. You may answer, sir.

2 A. It's really the same two reasons that I mentioned a little  
3 bit ago. Trying to make sure that Refco was not either being  
4 taken advantage of, to have value sucked out of it, or was not  
5 being propped up somehow because these were not arm's-length  
6 transactions with unrelated parties.

7 Q. And so after you asked Mr. Collins about any arrangements  
8 or contracts with Mr. Bennett, RGHI, Refco, what did he tell  
9 you?

10 A. My recollection is that he said that he had confirmed with  
11 Mr. Bennett that there were not any, other than Mr. Bennett's  
12 compensation arrangements.

13 Q. Did Mr. Collins ever tell you in that conversation, or  
14 otherwise, that at the end of each fiscal year, recent years,  
15 Refco and RGHI had participated in loan transactions to  
16 temporarily reduce the debt owed by RGHI to Refco?

17 A. No, he did not.

18 Q. And did Mr. Collins in this conversation, or ever, tell you  
19 that the end of every fiscal year, in recent years, Refco had  
20 guaranteed obligations of RGHI in the hundreds of millions of  
21 dollars?

22 A. No.

23 Q. What about indemnification agreements, did Mr. Collins tell  
24 you then, or at any time, that Refco had indemnification  
25 agreements relating to loans made to RGHI in the amounts of

CAPPOL4

Tabor - direct

1       hundreds of millions of dollars?

2       A. No.

3       Q. How did this first call -- Anything else that you recall  
4       talking about during the first March due diligence call?

5       A. I know we talked about a few other categories of things.

6       I'd have to refresh my memory by looking at my notes, though,  
7       on the other ones.

8       Q. Please do. Go ahead and take a moment to look at your  
9       notes. I think you said you put Tab A at the relevant page?

10      A. And just to be clear, I did not need to refresh my memory  
11       regarding one thing, which is, we talked about an SEC  
12       investigation, but there were other categories of things that,  
13       if you want me to mention them, I will have to refresh my  
14       memory.

15      Q. Well, before you do that, let me just ask you quickly what  
16       SEC investigation you talked about?

17      A. There was something referred to as the Sedona matter, which  
18       was an ongoing investigation of Refco by the SEC, and it's  
19       clearly something, as part of our diligence, we wanted to get  
20       our arms around, to the extent we could.

21           And one of the reasons for the call with Mr. Collins  
22       was to try to see if we could push forward diligence on that,  
23       and I recall he told me that we would have to schedule  
24       something separately on that.

25      Q. Okay. And go ahead and take a moment to look at your

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Tabor - direct

notes, and let us know if there are any other topics that you recall, having been refreshed from your notes, were discussed in this first March due diligence call?

A. Okay. We talked about acquisition agreements that the company has, where Refco had acquired other companies. We went through some of those specifically to make sure that we knew about all of them, that they were in the data room.

We talked about joint venture agreements, some of the same things, just trying to make sure we knew about all of them. We talked customer contracts and what forms were generally used.

Q. And, Mr. Tabor, how did the conversation, the call with Mr. Collins end?

A. Mr. Collins indicated he would try to help us set up the other call we'd been trying to set up with management of Refco on diligence matters, and he also mentioned at the end, as I recall, that we have to deal with the Sedona matter separately.

Q. And so was an additional due diligence call setup?

A. It was eventually, yes.

Q. And that's what I was referring to as the second March due diligence call?

A. Yes.

Q. And who do you recall participating in that?

A. Well, Mr -- in addition to myself, Mr. Collins, Mr. Trosten, Mr. Klejna, and I believe Mr. Collins; although, I

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Tabor - direct

1 cannot say with one hundred percent certainty.

2 Q. Did you take notes of that phone conversation?

3 A. I did, yes.

4 Q. I think I asked you that already, but just to be clear, let  
5 me walk up to you Government Exhibit 782. Do you recognize  
6 what's before you as Government Exhibit 782?

7 A. Yes, I do.

8 Q. What do you recognize it to be?

9 A. Another book of my Refco notes.

10 MR. CHERNOFF: Your Honor, the government offers 782.

11 MR. SCHWARTZ: Defense has no objection.

12 THE COURT: Received.

13 (Government's Exhibit 782 received in evidence)

14 Q. And, Mr. Tabor, I think you placed a Tab B at the top with  
15 respect to the notes of this call?

16 A. That's correct.

17 Q. And, actually, we have on the screen before us, this says  
18 "Book No. 2"?

19 A. That's right.

20 MR. CHERNOFF: Okay. If we could just advance,  
21 Mr. Smith, to Bates No. 140.

22 Q. And, Mr. Tabor, just to be clear, the original documents  
23 you have before you don't have these Bates numbers on them that  
24 I'm using?

25 A. Right.

CAPPOL4

Tabor - direct

1 Q. Okay. We're just calling those out because we've added  
2 them to the copies.

3 And so what's before you on the screen are the  
4 beginning of your notes of that call?

5 A. Correct.

6 Q. And what date did you put on the notes of this call?

7 A. March 30th.

8 Q. 2004?

9 A. 2004, yes.

10 Q. And so there's a mention that it's a diligence call with  
11 Dennis Klejna, Rob Trosten and Phillip?

12 A. Correct.

13 Q. And if Mr. Collins was in this, you didn't report him at  
14 the top of the notes?

15 A. That's right.

16 Q. What happened? How did this call begin? What was  
17 discussed?

18 A. I remember we discussed a number of diligence topics. I  
19 believed the first one was debt of the company, and I recall  
20 asking whether Refco had debt that we had not already seen or  
21 that was not already in the data room.

22 Q. Do you remember who responded to that question?

23 A. Mr. Bennett did.

24 Q. And what did he say?

25 A. I recall him saying that there wasn't anything we hadn't

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Tabor - direct

1 seen. He did mention, I recall, a \$16 million piece of  
2 intercompany debt, but it really was not debt of Refco. It was  
3 some outside parties. It was various Refco entities within the  
4 wholly owned group, one of them owed the other one \$16 million,  
5 as I recall.

6 Q. And so is that what's known as debt within the consolidated  
7 group?

8 A. Yes.

9 Q. Okay. And what else was discussed in this call?

10 MR. CHERNOFF: We can take down the exhibit,  
11 Mr. Smith.

12 Q. But if you do need to refer to your notes, just let us know  
13 and we'll bring them up.

14 A. I think there were a number of things discussed. Some that  
15 come to mind immediately, I asked about agreements among the  
16 various owners of Refco. So if people who owned direct --  
17 Refco, directly or indirectly, had agreements among themselves,  
18 I asked about those.

19 And I recall Mr. Bennett responded that there were not  
20 any such agreements in place among the owners that in any way  
21 would impact Refco.

22 Q. What did you understand that to mean?

23 A. That whatever arrangements they had among themselves would  
24 not in any way impact the company our client was trying to buy.

25 Q. In this conversation on March 30th, did anyone tell you

CAPPOL4

Tabor - direct

1 about the proceeds participation act, and the right it gave  
2 BAWAG to exercise an option on the equity of Refco?

3 A. Just to be clear, you said "proceeds participation act."  
4 You mean agreement?

5 Q. I'm sorry. Agreement, thank you.

6 A. No, nobody mentioned that agreement.

7 Q. Were you told about any agreement under which Refco  
8 received \$467 million from BAWAG?

9 A. No, we were not.

10 Q. How about an agreement by RGHI -- between RGHI and the  
11 BAWAG-related entity requiring the \$350 million of debt owed by  
12 RGHI be retired by Refco?

13 A. No, we were not told about that.

14 Q. Were you told about any agreements among the owners that  
15 could block the sale of Refco?

16 A. No, I was not.

17 Q. During this second March due diligence call, did you again  
18 ask about shareholder loans or options?

19 A. I certainly asked about shareholder -- when you say --  
20 stock options or things like that I asked about, if that's what  
21 you're referring to. So in other words, the same category that  
22 I had talked to Mr. Collins about before.

23 In other words, does anybody have some right to become  
24 an owner of this company.

25 Q. And what were you told?

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Tabor - direct

1 A. I was told that none of that stuff existed.

2 Q. And during this second March due diligence call, did you  
3 ask about the existence of material contracts?

4 A. Yes.

5 Q. What were you told?

6 A. Well, we were told that there weren't any such contracts,  
7 other than what was in the data room.

8 Q. And why were you asking about material contracts on this  
9 call?

10 MR. SCHWARTZ: Objection.

11 A. We wanted --

12 THE COURT: Overruled. Same ruling.

13 A. We wanted to understand what the important contracts were  
14 that the company had so that we could look at them from a legal  
15 perspective, and also, so that our client could understand it  
16 economically.

17 Q. And when you asked about material contracts, again, did  
18 anyone make reference to the indemnification agreements, the  
19 guarantees or the loan agreements that I made mention of a few  
20 questions back?

21 A. No.

22 Q. Now, Mr. Tabor, did there come a time when your client,  
23 Lee, did provide Refco with a letter of intent?

24 A. Yes, they drafted one, yes.

25 Q. And what, briefly, is a letter of intent?

CAPPOL4

Tabor - direct

1 A. It's a short version of an agreement, which largely is not  
2 legally binding, which just lays out the parameters of the deal  
3 that you will work towards.

4 Q. And you say you provided Refco with a draft. Who drafted  
5 it?

6 A. I believe the first draft was actually done by Mr. Westra,  
7 while I was off doing something else, but I worked on it also.

8 Q. And after you provided the draft to Refco, how did the  
9 process unfold?

10 A. Well, there were some discussions. I recall we got  
11 comments to the letter, and ultimately sat down and met about  
12 it to try to hammer it out.

13 Q. How many meetings did you attend?

14 A. Well, I attended two meetings that were in person, and just  
15 to be clear, as I sit here now, I believe that we delivered the  
16 draft after the first meeting. I think we had a meeting, and  
17 then we delivered the draft, and then we had another meeting.

18 Q. Tell us about the first meeting. Where did that take  
19 place?

20 A. It took place in New York, at Thomas Lee's office.

21 Q. And do you recall when it took place?

22 A. Yes. It was April the 9th, 2004.

23 Q. Who attended this first meeting on the letter of intent?

24 A. On the Refco side, it was Phil Bennett and Joseph Collins.  
25 On the Lee side, there were a number of Lee people, including

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Tabor - direct

1 Scott Schoen and Scott Jaeckel, and a couple of others. And  
2 Jim Westra and me, and I think there were bankers, Sandler  
3 O'Neill had a representative there.

4 Q. And what was discussed at this first meeting on the letter  
5 of intent on April 9?

6 A. Certain basic deal parameters that would have to be agreed  
7 to if we were going to try to move forward to actually get a  
8 letter of intent done.

9 Q. Do you recall what the deal parameters were?

10 A. Certainly recall a couple of significant ones that were  
11 discussed.

12 Q. Which were those?

13 A. Okay. One was the Lee people wanted to make very clear  
14 that, going forward, if a deal got done, there could be no more  
15 intercompany loans -- or I'm sorry, shareholder loans or things  
16 like that. So no more loans made to shareholders or similar  
17 transactions with shareholders. That would all have to be  
18 cleaned up. So that's -- Go ahead.

19 (Continued on next page)

20

21

22

23

24

25

Capdcol5

Tabor - direct

1 Q. Let me stop you there.

2 When you say no more shareholder loans, you were  
3 referring to the loans you were told about between RGHI and  
4 Refco in the amount of 100 million, approximately?

5 A. Right, that that would have to be repaid, done away with,  
6 and there couldn't be any more of those going forward.

7 Q. What was the next subject?

8 Actually, I'm sorry. Why were you demanding that in  
9 this meeting?

10 A. Well, from our client's perspective --

11 MR. SCHWARTZ: Objection.

12 THE COURT: The same answer.

13 You may answer.

14 A. From our client's perspective, they wanted to make sure  
15 that going forward if they did the deal, this was going to be a  
16 stand-alone company. It was not going to be engaging in  
17 transactions with shareholders or other related parties, and it  
18 would have cleaned up any transaction that existed which they  
19 knew about.

20 Q. Before I interrupted you, you were about to mention the  
21 next subject.

22 A. Yes. The next subject was that there was supposedly \$500  
23 million of excess cash that this company had that it, as was  
24 claimed to us, could have distributed out but didn't. So the  
25 money was still sitting in the company. And I recall that

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Tabor - direct

1 Mr. Bennett indicated that if that money was going to stay in  
2 the company, then Lee was going to have to pay for it, so it  
3 was going to increase the purchase price; they would have to  
4 pay for that.

5 Lee had no interest in just buying cash. So there was  
6 discussion about whether there could be assurances obtained  
7 that the money really was excess cash, really was not needed  
8 for this business in any way, and if we could figure out a way  
9 to confirm that, then perhaps the money could be distributed  
10 out before the closing -- distributed out to the old Refco  
11 owners before the closing.

12 Q. And by the way, Mr. Tabor, did you yourself take any notes  
13 at this April 9th meeting on the Letter of Intent?

14 A. I don't believe so.

15 MR. CHERNOFF: Let me just pause for a minute and ask  
16 that Mr. Smith bring up Government Exhibit 320, which we offer  
17 pursuant to our handwriting stipulation.

18 THE COURT: Received.

19 (Government's Exhibit 320 received in evidence)

20 MR. CHERNOFF: And pursuant to our stipulation that  
21 this is the handwriting of the defendant, I will ask,  
22 Mr. Smith, if you could just highlight, actually, first just  
23 the top of the notes, which say "April 9, 2004 meeting at TH  
24 Lee."

25 Q. Mr. Tabor, you said that this meeting was in fact at TH

Capdcol5

Tabor - direct

1 Lee's New York offices?

2 A. Yes, it was.

3 Q. And Mr. Smith has highlighted, "500m, comfort on how  
4 business can still be" -- well, I'll skip that.

5 There is a reference now to a "Segregation Solution."

6 What was the segregation solution? Was that something  
7 that was discussed?

8 A. It was discussed conceptually that somehow maybe this 500  
9 million could be essentially put on a shelf, so just segregated  
10 from everything else. The company wasn't using it, wasn't  
11 relying on it any way. So if it could be segregated between  
12 the time the deal was essentially agreed to and the closing,  
13 which was going to be sometime later, then maybe Lee could get  
14 comfort that it really was extra money, that it was excess  
15 cash.

16 MR. CHERNOFF: And, Mr. Smith, if you could just  
17 highlight the next item after "Segregation Solution," and I  
18 believe that is "Shareholder Loans."

19 Q. That was the other topic you referred to?

20 A. Yes.

21 MR. CHERNOFF: Thank you, Mr. Smith.

22 Q. Now, you said there was a follow-up meeting, maybe after a  
23 draft was circulated, on April 15th?

24 A. That's right.

25 Q. And who do you recall attending that meeting?

Capdcol5

Tabor - direct

1 A. I believe it was the same group of people. Certainly from  
2 the Refco side, it was Mr. Bennett and Mr. Collins. I believe  
3 it was the same people from the Lee side and as well as from  
4 the Weil side, Mr. Westra and me.

5 Q. And so what was the main purpose of this meeting, as you  
6 understood it?

7 A. Well, this meeting was intended actually to try to hammer  
8 out the language of the Letter of Intent, so it was much more  
9 of a lawyer participation meeting because we were trying to  
10 actually finalize the language of the Letter of Intent.

11 Q. How long did this meeting last?

12 A. Well, I think the clients stayed for a few hours, but after  
13 they left Mr. Collins and I stayed and continued to work on the  
14 Letter of Intent. And ultimately Mr. Collins had to leave for  
15 something, and I took the Letter of Intent, went back to my  
16 office here in New York, and actually created a new draft of it  
17 that night and sent it around to Mr. Collins and others.

18 Q. And as a result of all of this work that you were doing  
19 with Mr. Collins, with your client, etc., was there ultimately  
20 a finalized Letter of Intent that was reached?

21 A. Yes. Over the next few days after that meeting we finished  
22 it.

23 Q. Let me ask you to take a look at what's before you marked  
24 Government Exhibit 1003, in evidence.

25 And if you flip, Mr. Tabor, to the pages that in the

Capdcol5

Tabor - direct

1 lower right-hand corner are marked 92, 91.

2 You see, sir, this is an executed copy of the Letter  
3 of Intent agreement?

4 A. Yes, I see that.

5 Q. And this agreement is from your client, Thomas H. Lee  
6 Partners, represented by Mr. Schoen, to Phillip Bennett at  
7 Refco?

8 A. That's right.

9 Q. And we see from the signature page, 92, that it was signed  
10 by Mr. Bennett on behalf of both Refco and the Refco Group  
11 Holdings, Inc., RGHI, on April 19th?

12 A. Correct.

13 Q. Let me ask you to take a quick look at page 3 of the Letter  
14 of Intent.

15 Is there some reference here in the agreement that you  
16 negotiated with Mr. Collins concerning the shareholder loans  
17 that you had been told about?

18 A. Yes.

19 Q. What is that?

20 A. Well, in Clause 4 in Section 3, it provides that "Any  
21 existing shareholder loans will be terminated prior to closing  
22 and funded with cash otherwise payable to the sellers, and all  
23 existing agreements, contracts or arrangements between the  
24 company and the sellers or their affiliates will be terminated  
25 (other than employment obligations," and so forth.

Capdcol5

Tabor - direct

1 Q. And looking down to Roman Numeral 3, there is reference to  
2 120 million that was accrued for distribution, it says, and not  
3 more than 12 million will be distributed in cash, which leaves  
4 108 million.

5 Was that the amount you were told was the existing  
6 debt from RGHI to Refco?

7 A. I believe that's what we thought it was at the time, yeah,  
8 I think.

9 Q. And is there reference here in the contract, in paragraph  
10 3, to the 500 million we have been talking about in excess  
11 working capital?

12 A. Yes. In this sentence I see a reference to the 500  
13 million.

14 Q. And there is discussion about the mechanic that's going to  
15 be used to confirm that that is actually excess working  
16 capital?

17 A. Correct.

18 Q. And while you were negotiating this document face-to-face  
19 with Mr. Collins, you and he alone, did he say anything  
20 different to you about any of these subjects that we see in  
21 paragraph 3?

22 A. No.

23 Q. Now, at the time that this Letter of Intent was executed on  
24 April 19th, was the due diligence complete?

25 A. No. There were still a number of items that we were

Capdcol5

Tabor - direct

1 working on.

2 Q. Were some of those memorialized in Exhibit C to this  
3 document? That's Exhibit 300 in the lower right-hand corner,  
4 if that helps you find it.

5 A. Yes. I recall we attempted to list the pending diligence  
6 items as of that time.

7 Q. So we see here, number 2 refers to "Debt." Intercompany  
8 debt. That was something you, I think, talked about?

9 A. Right. This was the \$16 million fully internal piece of  
10 debt that Mr. Bennett told us about on the call on the 30th.

11 MR. CHERNOFF: Mr. Smith, could we highlight number 6.

12 Q. You were still seeking indemnification arrangements?

13 A. Correct.

14 Q. Number 7, you are still seeking shareholder agreements?

15 A. I think this was really referring to shareholder agreements  
16 where Refco was less than a hundred percent owner of some  
17 entity, so that is sort of subsidiaries where there might be  
18 another owner also.

19 Q. Let's go to the next page. The last paragraph says:  
20 "Material Contracts. Please confirm that there are no other  
21 contracts considered material by management that have not been  
22 supplied."

23 Fair to say you were still looking for those, too?

24 A. Yes.

25 Q. Now, by the way, Exhibit C, the outstanding diligence

Capdcol5

Tabor - direct

1 requests -- I'm sorry. It is called the "Pending Due Diligence  
2 Request," "Pending Legal, Financing and Tax Due Diligence  
3 Request," did Exhibit C include all of items you had been  
4 asking Mr. Collins for back in the first due diligence call on  
5 March 23rd?

6 A. There were a number of things that we had asked Mr. Collins  
7 about on that first March call that were no longer on our list  
8 because we had gotten confirmation that they weren't  
9 applicable.

10 Q. So between your call on March 23rd and this Exhibit C being  
11 signed on April 19, some items came off the list, your due  
12 diligence list?

13 A. Right. There were things that we were not asking for here  
14 because we had been told that they were not applicable or  
15 didn't exist.

16 Q. And with respect to material contracts or indemnification  
17 arrangements, which were two of the requests particularly in  
18 Exhibit C, did you receive any further information from Refco  
19 on those subjects?

20 A. Yes. Ultimately, we got a memo as to the absence of any  
21 additional material contracts.

22 Q. As you went forward from the Letter of Intent signing with  
23 respect to these pending requests, who were you addressing your  
24 due diligence requests to?

25 A. Well, at the time we signed the Letter of Intent we agreed

Capdcol5

Tabor - direct

1 that Mr. Collins would take the lead in trying to get us  
2 responses on the things that were still on our list. So we  
3 were dealing largely with Mr. Collins.

4 Q. And you said you got a confirmation that there were no such  
5 indemnification obligations?

6 A. Yes, we did.

7 Q. And no such material contracts?

8 A. Correct.

9 Q. Let's look, please, at Exhibit 704.

10 A. OK.

11 Q. And do you see this is an e-mail addressed to you and  
12 cc'ing others from Surrel Richards?

13 A. Yes.

14 Q. Was he a lawyer at Mayer Brown?

15 A. I actually thought this was Mr. Collins' assistant but it  
16 was somebody who worked with Mr. Collins at Mayer Brown.

17 MR. CHERNOFF: The government offers 704, your Honor.

18 MR. SCHWARTZ: No objection.

19 THE COURT: Received.

20 (Government's Exhibit 704 received in evidence)

21 BY MR. CHERNOFF:

22 Q. So, Mr. Tabor, this was an e-mail that you received from  
23 someone at Mayer Brown, and we see below that sort of globe,  
24 "From Joseph Collins."

25 A. I'm sorry. Oh, yes. I see the "From Joseph Collins."

Capdcol5

Tabor - direct

1 Q. And this is to you, copying Mr. Bennett and Ms. Lang, at  
2 Mayer Brown, among others?

3 A. Correct.

4 Q. "Subject, Project Royce Due Diligence; Indemnification."  
5 Do you see the subject there?

6 A. Yes, I do see it.

7 Q. And the top of the screen has it up, too, whichever is  
8 easier to look at. We are trying to highlight them as I call  
9 them out.

10 A. OK.

11 Q. Turn to the next page, and let's look at the attachment to  
12 the e-mail. You see this is a memorandum from Mr. Collins to  
13 yourself, dated May 6, 2004?

14 A. Yes.

15 Q. This is the advice you received concerning the Exhibit C  
16 request for indemnification obligations?

17 A. Yes. We understood this to be a response to that request.

18 Q. OK. It says, "We have been advised by Refco that there are  
19 no significant indemnification obligations which have not been  
20 disclosed already."

21                   Correct?

22 A. Yes, I see that.

23 Q. Now, we already discussed the fact that you were never told  
24 about indemnification obligations concerning loans that RGHI  
25 had taken that Refco was indemnifying third parties against?

Capdcol5

Tabor - direct

1 A. Correct.

2 Q. And you were never told about the Proceeds Participation  
3 Agreement, correct?

4 A. Correct.

5 Q. Let me ask that we put flip to Government Exhibit 1504.  
6 And just looking at the first page, this is the Proceeds  
7 Participation Agreement, correct?

8 A. Yes.

9 Q. Let me ask that we take a look at page 13, which is Bates  
10 No. 265.

11 And, Mr. Tabor, do you see here there is an article  
12 called, "Indemnification of DFI?"

13 A. Yes.

14 Q. And I'll read it: "Indemnification of DFI. The  
15 company" --

16 And, Mr. Tabor, just flip back, if you would follow  
17 with me, to page 2, Bates No. 63 -- I am going to skip that,  
18 which defines the company?

19 A. Yes, I see it.

20 Q. Do you see the company is defined as Refco Group Limited?

21 A. Yes.

22 Q. And, sorry, go back to page 13. It says: "The company  
23 agrees to indemnify each of DFI indemnified parties against,  
24 and agrees to hold each of them harmless from, any and all  
25 losses incurred or suffered by them relating to or arising out

Capdcol5

Tabor - direct

of or in connection with any third-party claim in which DFI or a DFI indemnified party is named as a party, arising out of any material inaccuracy in any representation or material breach of, or failure duly to perform or observe, any material warranty, covenant, or other agreement made by the company in this agreement."

Mr. Tabor, this is an indemnification agreement that the company made indemnifying DFI, correct?

A. Yes.

Q. And did Mr. Collins tell you that this indemnification of DFI was in effect at the time that he sent you that memo?

A. No.

Q. Let me ask you to look at Government Exhibit 705.

Again, Mr. Tabor, do you see on the cover this is -- the first page, rather, this is an e-mail from someone at Mayer Brown to yourself, and it says "From Joseph Collins" under the e-mail addresses?

A. I don't actually see it on the screen yet, and I for some reason don't seem to be able to put my hands on it here.

Q. I'm sorry. Let me walk it up to you.

A. I found it. I'm sorry. I found it.

Yes. What you described is correct.

MR. CHERNOFF: Your Honor, the government offers 705.

MR. SCHWARTZ: No objection.

THE COURT: Received.

Capdco15

## Tabor - direct

(Government's Exhibit 705 received in evidence)

BY MR. CHERNOFF:

Q. So, Mr. Tabor, this appears to be an e-mail you received from -- or on behalf of Mr. Collins on May 6th of 2004, correct?

A. Correct.

Q. And let's turn to the next page.

Attached appears to be a memorandum to you, Mr. Tabor, from Mr. Collins on May 6th. I'll read it out: "Project Royce Due Diligence; Material Contracts."

"We were advised by Refco management that all material contracts were either in the data room or are being produced in response to the requests in Exhibit C to the Letter of Intent."

A. I see that, yes.

Q. And at the time that Mr. Collins sent you this memo on May 6th, had he told you or did he after that tell you about a contract that resulted in Refco receiving \$467 million from a BAWAG-related entity?

A. No.

Q. And how about a contract that gave a BAWAG-related entity the right to acquire 27.2 percent of Refco's equity?

A. No.

Q. How about an agreement through which the BAWAG-related entity could block the sale you were negotiating?

A. No.

Capdcol5

Tabor - direct

1 Q. Mr. Tabor, did you continue to pursue diligence requests  
2 with Refco after receiving that correspondence from  
3 Mr. Collins?

4 A. When you say did we continue to pursue diligence requests,  
5 you mean with respect to material contracts?

6 Q. No. I just meant general.

7 A. This was on May 6th. I think there were still some  
8 requests that were pending and still being under pursuit  
9 until -- they still were under pursuit until closer to the  
10 signing of the agreement.

11 Q. Let me ask you to look at Government Exhibit 706.

12 A. OK.

13 Q. And do you recognize this as an e-mail from Adam Nelson, at  
14 Weil, to Joseph Collins from May 13, 2004?

15 A. Yes.

16 MR. CHERNOFF: Your Honor, the government offers 706.

17 MR. SCHWARTZ: No objection, your Honor.

18 THE COURT: Received.

19 (Government's Exhibit 706 received in evidence)

20 BY MR. CHERNOFF:

21 Q. And, Mr. Tabor, if you give me a moment, I am just going to  
22 read out the part beginning "Joe."

23 "Joe, attached is a list" -- actually, it just says,  
24 "Attached is list of outstanding diligence items/questions,  
25 reflecting the status of our diligence as of today. I have

Capdcol5

Tabor - direct

1 included on this list both items that are currently  
2 outstanding, as well as questions that have arisen from the  
3 items we have recently reviewed. Please give me a call if you  
4 would like to discuss or let me know if you have any questions.

5 "Best, Adam."

6 And, Mr. Tabor, you are copied on this e-mail as well,  
7 correct?

8 A. Yes.

9 Q. Let's look at the attachment that is dated, do you see up  
10 in the right-hand corner, your law firm's initials and May 13,  
11 2004?

12 A. Yes.

13 Q. So this is titled "Outstanding Legal Due Diligence Items."  
14 I want to focus on number 5.

15 It says: "Voting agreements, stockholder agreements  
16 or any other material agreements relating to the relationships  
17 between RGHI, Refco Group Holdings, BAWAG Overseas and Refco  
18 Group Limited."

19 And let me ask you with reference to these outstanding  
20 requests, were you at this time -- do you recall whether you  
21 were still trying to obtain the current LLC agreement for  
22 Refco?

23 A. That's right. We didn't have the actual LLC agreement at  
24 this time.

25 Q. So in this e-mail you're asking again -- or your colleague

Capdcol5

Tabor - direct

1 is asking again, Mr. Collins, for this LLC agreement?

2 A. Yes. I think that request in number 5 certainly picks up  
3 the LLC agreement.

4 Q. Let me -- I want to back up a little bit and ask you to  
5 look at Government Exhibit 721.

6 MR. CHERNOFF: Your Honor, I lost track of time.

7 Should we --

8 THE COURT: Would you like to take a little break now,  
9 friends?

10 A JUROR: Yes.

11 THE COURT: All right. It sounds like a yes.

12 Let's take the break. You'll follow the usual rules.  
13 Take your pads with you. Leave your exhibits. Don't discuss  
14 the case.

15 Thank you, friends.

16 (Jury not present)

17 THE COURT: Thank you, folks. Off the record.

18 (Discussion off the record)

19 (Recess)

20 THE CLERK: Jurors entering.

21 (Jury present)

22 THE COURT: Thank you. Won't you be seated.

23 We continue with the direct examination of the  
24 witness.

25 Mr. Chernoff.

Capdcol5

Tabor - direct

1 MR. CHERNOFF: Thank you, your Honor.

2 BY MR. CHERNOFF:

3 Q. So, Mr. Tabor, before the break I just began to ask you to  
4 look at Government Exhibit 721.

5 A. OK.

6 Q. And this appears to be an e-mail from yourself to various  
7 people and then forwarded on by Daniel Gewirtz?

8 A. I believe it was an e-mail from Dan Gewirtz to a number of  
9 people that I then forwarded to some people at Lee.

10 Q. Thank you. Right.

11 MR. CHERNOFF: The government offers 721, your Honor.

12 MR. SCHWARTZ: No objection.

13 THE COURT: Thank you. Received.

14 (Government's Exhibit 721 received in evidence)

15 BY MR. CHERNOFF:

16 Q. And so, Mr. Tabor, this is an e-mail that was sent on  
17 March 10, 2004 from your colleague, Mr. Gewirtz?

18 A. Correct.

19 Q. And it is sent to all --

20 A. I'm sorry. It was not sent from my colleague on that day.  
21 It was forwarded by me on that date. I may have misspoke.

22 Q. I think I asked you the question in a way that caused you  
23 to do that. Sorry.

24 Mr. Gewirtz composed this on February 27 that you  
25 forwarded on on March 10?

Capdcol5

Tabor - direct

1 A. Correct.

2 Q. So Mr. Gewirtz is addressing this correspondence to someone  
3 named Paul Kromwyk at CSFB, the investment banker on this deal,  
4 right?

5 A. Correct.

6 Q. I will just read out, if we could focus on the middle,  
7 where it says, "Owners of Refco Group Limited, LLC."

8 And your colleague Mr. Gewirtz writes: "We saw an  
9 unexecuted copy of the parent company LLC agreement and noted  
10 that the signatory members to the LLC agreement were two  
11 corporations and an LLC (Refco Group Holdings, Inc., Refco  
12 Group Holdings LLC and BAWAG Oversees, Inc.). We would like to  
13 see the corporate documentation for such entities as well as  
14 view any arrangements among the members, such as shareholders  
15 agreements or other contractual arrangements. We would also  
16 like to see the executed parent company LLC agreement and a  
17 capitalization chart."

18 Mr. Tabor, was this one of the efforts that you  
19 testified about earlier to get a signed copy, an executed copy  
20 of the Refco LLC agreement?

21 A. Yes. This was one of the efforts.

22 Q. At that time addressed to --

23 A. At that time, yes.

24 Q. Let me ask you to look now at Government Exhibit 707, which  
25 should be next there.

Capdcol5

Tabor - direct

1 A. OK.

2 Q. And this is an e-mail from Adam Nelson, at the Weil firm,  
3 to Joseph Collins, among others?

4 A. Yes.

5 MR. CHERNOFF: The government offers 707.

6 MR. SCHWARTZ: No objection.

7 THE COURT: Received.

8 (Government's Exhibit 707 received in evidence)

9 BY MR. CHERNOFF:

10 Q. And, Mr. Tabor, this e-mail is now dated -- we are now at  
11 May 19, 2004?

12 A. Correct.

13 Q. And your colleague, Mr. Nelson, wrote: "Joe and Paul."

14 Do you remember Paul Koury as a lawyer at Mayer Brown?

15 A. I do, yes.

16 Q. And he is there in the addressees in this e-mail?

17 A. Yes.

18 Q. With Mr. Collins.

19 "Joe and Paul, as we discussed on the call yesterday,  
20 attached is our list of outstanding diligence, reflecting all  
21 of the open items as of today. Note that we still need to  
22 review some of the recently provided items in detail and, as we  
23 do, we may have additional questions," etc.

24 Let me ask you to flip to the next page. "Outstanding  
25 Business and Legal Diligence" is how this is titled. It has

Capdcol5

Tabor - direct

1 got 17 items. And you see that the first one says, "Amended  
2 LLC Agreement for Refco Group Limited, LLC evidencing removal  
3 of Refco Group Holdings, LLC and indicating current managers."

4 What were you asking for here? What was Weil asking  
5 for here, Mr. Tabor?

6 A. We were just asking for the operative LLC agreement because  
7 we still didn't have it at this point.

8 Q. And what, by the way, was meant by "Evidencing removal of  
9 Refco Group Holdings LLC?"

10 A. This was just referring to some of the stuff that was  
11 screwed up in the draft we saw in the data room, because it had  
12 this entity, which we understood didn't exist anymore as one of  
13 the members, among other things that were incorrect, but it  
14 also wasn't executed.

15 Q. Refco Group Holdings LLC is not Refco Group Holdings Inc.?

16 A. That's right. Different entity.

17 Q. OK. Let me ask you to look now at Government Exhibit 708.

18 Do you recognize this as another e-mail from Adam  
19 Nelson to Mr. Collins, copying yourself, among others?

20 A. Yes.

21 MR. CHERNOFF: The government offers 708, your Honor.

22 MR. SCHWARTZ: No objection.

23 THE COURT: Received.

24 (Government's Exhibit 708 received in evidence)

25 BY MR. CHERNOFF:

Capdcol5

Tabor - direct

1 Q. And just take a look at the "Outstanding Business and Legal  
2 Diligence" that is attached, page 2 of this exhibit.

3 Here it says, in number 1, that you are still looking  
4 for this amended LLC agreement, correct?

5 A. That's correct.

6 Q. And now it says at the end in bold, "J. Collins to  
7 prepare."

8 Do you have any understanding of why it said that?

9 A. Yes. At this point we had been told that whatever was the  
10 operative LLC agreement that the company had been existing  
11 under was not in existence anywhere in writing. I mean, they  
12 were going to have to actually prepare a version of it and have  
13 it executed, and so Mr. Collins said he would do that.

14 Q. OK. So I'm going to step away from that sequence of events  
15 for a moment leaving off on May 20th, and let me -- actually,  
16 I'm sorry. Let me ask you to look at Government Exhibit 710,  
17 and I will ask you if you recognize that as the memo to you  
18 from Mr. Collins on June 2nd?

19 A. Yes, I do.

20 MR. CHERNOFF: The government offers 710, your Honor.

21 MR. SCHWARTZ: No objection.

22 THE COURT: Received.

23 (Government's Exhibit 710 received in evidence)

24 BY MR. CHERNOFF:

25 Q. And so, Mr. Tabor, in this memorandum, Mr. Collins attaches

Capdcol5

Tabor - direct

1 the Fourth Amended LLC Agreement, which you understood to be  
2 the one you were trying to get?

3 A. Yes. That's right.

4 Q. I will just read the first item:

5 "Jay, attached are the following documents:

6 "1. Fourth Amended and Restated Limited Liability  
7 Company Agreement of Refco Group Limited, LLC which evidences  
8 the withdrawal of Refco Group Holdings LLC and the status of  
9 Phillip R. Bennett and Joseph Murphy as managers."

10 And, Mr. Tabor, why are Mr. Bennett and Mr. Murphy  
11 being referenced as managers at this point?

12 A. My understanding is that they had been acting in the  
13 capacity as managers but whatever the draft LLC agreement was  
14 that existed in the data room didn't list them as managers, so  
15 that needed to be fixed.

16 Q. And this entity Refco Group Holdings LLC that no longer  
17 existed was apparently withdrawn from the LLC?

18 A. Yes.

19 Q. And so having received this Fourth Amended LLC Agreement  
20 from Mr. Collins, with respect to this issue, did you believe  
21 you had gotten what you needed?

22 A. Well, I think at this point he sent us one that didn't yet  
23 have the signature pages, but we understood this was the final  
24 one. We just had to get the signature pages attached.

25 Q. So did you ask for the signature page?

Capdcol5

Tabor - direct

1 A. Well, I think we had already understood we would be getting  
2 those, and he ultimately sent them to us.

3 Q. I will ask you to look at Government Exhibit 502, and is  
4 that a fax from Mr. Collins to your colleague Mr. Nelson with  
5 the signature page?

6 A. Yes.

7 MR. CHERNOFF: The government offers 502.

8 MR. SCHWARTZ: No objection.

9 THE COURT: Received.

10 (Government's Exhibit 502 received in evidence)

11 BY MR. CHERNOFF:

12 Q. Mr. Tabor, now I want to show you Government Exhibit 501-O,  
13 which is in evidence, and this is a document that's also called  
14 The Fourth Amended and Restated Limited Liability Company  
15 Agreement of Refco Group Limited LLC.

16 A. OK.

17 Q. And look at the back of this document.

18 Do you see on page 25, this is an executed copy with  
19 signatures from Mr. Bennett, for Refco Group Holdings,  
20 Mr. Bennett himself for BAWAG Overseas, Inc., and Mr. Bennett  
21 from RGH -- well, Refco Group Holdings LLC?

22 A. Yes.

23 Q. Have you had an opportunity to review 501-O?

24 A. Yes, I have.

25 Q. When was the first time you saw 501-O?

Capdcol5

Tabor - direct

1 A. It was years after the collapse of Refco.

2 Q. So was this signed copy of The Fourth Amended and Restated  
3 Limited Liability Company Agreement ever provided to you by  
4 Mr. Collins?

5 A. No.

6 MR. CHERNOFF: Your Honor, at this time we offer  
7 Government Exhibits 170 through 174, which contain excerpts of  
8 Government Exhibit 501-O and Government Exhibit 710.

9 THE COURT: Any objection?

10 MR. SCHWARTZ: No objection.

11 THE COURT: Thank you. Received.

12 (Government's Exhibits 170 - 174 received in evidence)

13 MR. CHERNOFF: Could we bring up Government Exhibit  
14 170.

15 Q. So, Mr. Tabor, have you had a chance to look at this slide  
16 and the other ones I just made reference to?

17 A. Yes, I have.

18 Q. And so the top excerpt refers to Government Exhibit 170.  
19 That's the agreement you were provided by Mr. Collins and  
20 subsequently provided with a signature page for in June of  
21 2004, correct?

22 A. I'm sorry. Did you say the top one is that? I want to  
23 make sure --

24 Q. I'm sorry. Thank you.

25 The bottom one, Government Exhibit 710.

Capdcol5

Tabor - direct

1 A. Right.

2 Q. And the top one is 501, the exhibit we just looked at, also  
3 The Fourth Amended and Restated Limited Liability Company  
4 Agreement that you were never provided with?

5 A. Correct.

6 Q. So the exhibit makes reference to the executed Fourth  
7 Amended LLC, and what Mr. Collins sent to Thomas H. Lee,  
8 through you, their lawyer, correct?

9 A. Correct.

10 Q. Do you see, first of all, with respect to the date of what  
11 Mr. Collins sent to you reflects a date of January 1, 2003?

12 A. Right.

13 Q. And the one that is in evidence as Government Exhibit 170  
14 was dated February 27, 2003?

15 A. Yes, I see that.

16 MR. CHERNOFF: Can we have the next one, Mr. Smith?

17 Q. Now, Mr. Tabor, do you see that the executed agreement that  
18 you did not receive makes reference to a company sale?

19 A. Yes.

20 Q. As item number L.

21 A. Correct.

22 Q. And the company sale is defined here to include -- I'm  
23 picking up on the second box -- "Sale of all the shares, or  
24 substantially all of the assets, of one or more of the  
25 following entities: Refco Group Holdings Inc., BAWAG Overseas,

Capdcol5

Tabor - direct

1 or DF Capital, a Delaware corporation."

2 A. Yes. I see that.

3 Q. Now, in the one that Mr. Collins sent to you, is that  
4 definition of company sale, which makes reference to DF  
5 Capital, deleted?

6 A. Yes. There is no such definition there.

7 Q. And instead Item L is now the designated amount?

8 A. Correct.

9 MR. CHERNOFF: Could we have 172, Mr. Smith?

10 Q. And so, Mr. Tabor, the executed agreement which you did not  
11 receive, here it is little R defines "Holding Company" to mean,  
12 among other things, number 3, "DF Capital, Inc., a Delaware  
13 corporation."

14 A. Yes, I see that.

15 Q. In the LLC Agreement, the Fourth Amended that Mr. Collins  
16 sent to you, in Item P, "Holding Company" is also defined,  
17 correct?

18 A. Correct.

19 Q. But there is no reference to DF Capital, Inc., here?

20 A. No, there is not.

21 MR. CHERNOFF: Could we have the next one, 173,  
22 Mr. Smith? Thank you.

23 Q. In the executed Fourth Amended LLC Agreement, which you did  
24 not receive, "Participation Agreement," in double A, means,  
25 "The Proceeds Participation Agreement dated as of July 12, 2002

Capdcol5

Tabor - direct

1 between the company and DF Capital Inc."

2 A. Yes. I see that.

3 Q. In the one that Mr. Collins sent you, the space between  
4 "non-voting member" and "person" no longer carries any  
5 reference to the Proceeds Participation Agreement?

6 MR. SCHWARTZ: Objection only to the phrase "no  
7 longer," your Honor. We concede there are different -- if he  
8 is using verbs like "no longer" or verbs like "deleted," we  
9 object. The comparison is fine.

10 MR. CHERNOFF: I apologize. I will rephrase it.

11 THE COURT: Yes, sir.

12 BY MR. CHERNOFF:

13 Q. In the agreement which you received, Mr. Tabor, there is no  
14 reference here between "non-voting members" and "person" to  
15 Participation Agreement, meaning the Proceeds Participation  
16 Agreement?

17 A. That's correct.

18 Q. And, in fact, in Government Exhibit 710, the LLC agreement  
19 you received, there is no reference whatsoever to the Proceeds  
20 Participation Agreement?

21 A. That's also correct.

22 Q. And there is no reference whatsoever in that document to DF  
23 Capital, Inc., is there?

24 A. No, there is not.

25 Q. Could we go to 174. Thank you, Mr. Smith.

Capdcol5

Tabor - direct

1                   And the top on the executed Fourth Amended LLC  
2 Agreement that is Government Exhibit 501, there is a definition  
3 here of assignment of membership shares. Do you see that?

4 A. Yes. I see that.

5 Q. It begins: "Except as provided in the Participation  
6 Agreement," correct?

7 A. Yes.

8 Q. Well, with respect to the bottom slide, what Mr. Collins  
9 sent to you, there is no reference to the Participation  
10 Agreement in this section?

11 A. That's correct.

12 Q. Thank you, Mr. Tabor. You can put those aside.

13                   Let me ask that you take a look at Government Exhibit  
14 810A.

15                   MR. CHERNOFF: And, your Honor, we offer that.

16                   MR. SCHWARTZ: No objection.

17                   THE COURT: Received.

18                   (Government's Exhibit 810A received in evidence)

19 BY MR. CHERNOFF:

20 Q. So, Mr. Tabor, this appears to be a memorandum from  
21 Mr. Collins to his clients, Mr. Bennett and Mr. Trosten, dated  
22 January 22, 2004, so backing up on the calendar.

23                   Did you ever receive this memo?

24 A. No.

25 Q. And I'm just going to read a portion of it, beginning with:

Capdcol5

Tabor - direct

1 "Attached is a preliminary draft of the LLC Agreement which  
2 would become effective upon closing of the proposed  
3 transaction. To assist your review a marked copy of the  
4 enclosed which reflects all proposed changes from the present  
5 LLC agreement." I guess it should say "is enclosed." Or maybe  
6 I am wrong on that. It says, "A number of points need your  
7 consideration."

8 And the first one says: "DF Capital. All the DF  
9 required charges and references were removed, including the  
10 distribution policy in Section 9(c)."

11 A. I see that.

12 Q. Attached -- if you take a look at 810B, and we offer that  
13 as the attachment to this memorandum, your Honor.

14 MR. SCHWARTZ: I have no objection.

15 THE COURT: Received.

16 (Government's Exhibit 810B received in evidence)

17 BY MR. CHERNOFF:

18 Q. You see there a draft of what's called the Fifth Amended  
19 and Restated Limited Liability Company Agreement.

20 A. Yes, I see that.

21 Q. And, Mr. Tabor, you had never received this draft of what  
22 would be a Fifth Amended and Restated LLC Agreement?

23 A. No, I did not.

24 Q. Let me ask that we look at 810C, which I had failed to  
25 bring up but we offer it.

Capdcol5

Tabor - direct

1 MR. SCHWARTZ: Sorry, your Honor. Just one moment.

2 THE COURT: Yes, sir.

3 (Pause)

4 MR. SCHWARTZ: No objection, your Honor.

5 THE COURT: Received.

6 (Government's Exhibit 810C received in evidence)

7 MR. CHERNOFF: If we could bring that up on the  
8 screen.

9 Q. And so, Mr. Tabor, this appears to be an e-mail from  
10 Ms. Radatz to Mr. Collins that is responding to an e-mail from  
11 Mr. Collins to Ms. Radatz in which she asks, "Could you please  
12 send me and Rob Trosten at Refco a copy of the Third Amended  
13 Limited Liability Company Agreement of Refco Group Limited LLC,  
14 dated July 12, 2003 (I believe). Thanks."

15 Mr. Tabor, March 2004 is, of course, when due  
16 diligence was underway in this deal?

17 A. Yes, it was.

18 Q. And Ms. Radatz writes back to Mr. Collins: "Joe, I found  
19 the agreement and send it to Mr. Trosten with a bcc to you. It  
20 is dated July 12, 2002. You should know that I found several  
21 different documents which are all Fourth Amended and Restated  
22 LLC for Refco Group. You have one, Pete has one, and so does  
23 Kellie. Karen."

24 Mr. Tabor, you never received this e-mail from  
25 Mr. Collins, did you?

Capdcol5

Tabor - direct

1 A. No, I didn't.

2 Q. After you received the LLC agreements and the other  
3 materials we have been talking about, fair to say there came a  
4 time when your client entered into the Equity Purchase Merger  
5 Agreement with Refco?

6 A. That's right.

7 Q. And that was on about June 8, 2004?

8 A. That's correct.

9 Q. Let me ask you to take a look at Government Exhibit 1005.1,  
10 which is what I will call the EPMA.

11 A. OK.

12 Q. Let me ask you this. This is, I'll just represent to you,  
13 the final document. Do you see, it is signed in the back.

14 What was the process in drafting this documents, to  
15 the extent you were involved?

16 A. Well, it was a process that extended over some period,  
17 because I believe early on CSFB had supplied us with some  
18 version of a Purchase Agreement. But once we negotiated  
19 essentially this deal, at least to the Letter of Intent stage,  
20 it was clear that our deal was going to be a lot different from  
21 the agreement they had provided. So we took their version as a  
22 base and kind of created a new form. So we had Weil prepare a  
23 draft and send it to Mayer Brown, and then there was back and  
24 forth over a period of time until we got to the point on  
25 June 8th of being prepared to sign it.

Capdcol5

Tabor - direct

1 Q. Who was principally responsible on the Lee side for the  
2 draft?

3 A. On the Lee side was Weil, Gotshal, I would say.

4 Q. I meant, who at Weil, Gotshal?

5 A. I would say I was principally responsible, and certainly  
6 Adam Nelson and other senior associates were helping me.

7 Q. And what about on the Refco side, who was principally  
8 respond for drafting it?

9 MR. SCHWARTZ: Objection, your Honor. How would he  
10 know that?

11 BY MR. CHERNOFF:

12 Q. Mr. Tabor, did you have -- I will lay a foundation, your  
13 Honor.

14 Mr. Tabor, did you deal with lawyers from Mayer Brown,  
15 representing Refco, who were drafting the EPMA?

16 A. Yes, I did.

17 Q. Did you deal with them extensively?

18 A. Yes.

19 Q. Who principally did you deal with?

20 A. Well, I'd say on day-to-day drafting, it was probably  
21 Angela Lang more than anybody else. So after we finished the  
22 Letter of Intent and produced a draft of this, we dealt more  
23 often than not with Angela, although there were negotiations  
24 where we were trying to resolve issues and Mr. Collins was  
25 involved as well. And I certainly had separate conversations

Capdcol5

Tabor - direct

1 with him about some of the provisions in there as well.

2 Q. What, if any, relationship is there between the EPMA and  
3 the Letter of Intent?

4 A. I think the EPMA attempts to embody what we describe in the  
5 Letter of Intent in more detail, in a way that's fully fleshed  
6 out and is legally binding.

7 Q. And, Mr. Tabor, I am going to skip around this document a  
8 little bit because we've heard testimony about it before, but  
9 let me ask you about a couple of provisions in 1005.1.

10 First of all, page 6 carries representations and  
11 warranties. Were these things that you helped negotiate?

12 A. Yes.

13 Q. And what is the purpose of the representation -- what was  
14 your purpose in seeking the language that's in the  
15 representations and warranties that are made here by the  
16 counterparty?

17 A. We wanted the counterparty in a legally binding manner to  
18 represent certain things about itself, most of which we already  
19 had been told, but to put it in black and white so that we  
20 could have legal recourse if those things were wrong.

21 Q. And among the representations and warranties, I will just  
22 ask that we skip ahead to Schedule 3.5, which is the  
23 representations -- I'm sorry, we can skip that one. Let's go  
24 to 3.9, Mr. Smith.

25 A. 3.9?

Capdcol5

Tabor - direct

1 Q. Yes. 3.9 I believe is a representation that Refco had made  
2 with respect to its financial statements.

3 A. Correct.

4 Q. Let me ask you to take a look at what we'll bring up on the  
5 screen as Government Exhibit 6006.

6 A. OK.

7 Q. Do you see that's the financial statement for fiscal year  
8 2003 of Refco, audited by Grant Thornton?

9 A. Yes.

10 Q. And if you could look to page 12.

11 A. OK.

12 Q. In Note "i" is there a representation there with respect to  
13 the related-party debt RGHI owed Refco in the amount of 105  
14 million, according to this statement?

15 A. Right. This was the loan that we had discussed before. I  
16 think the amount may have varied slightly from time to time but  
17 it was a little over 100 million.

18 Q. Let me ask you to look at Government Exhibit 6007, if you  
19 would bring that up.

20 And is this the audited financial statements for year  
21 ending 2004 for Refco, audited by Grant Thornton?

22 A. Yes.

23 Q. And if you can flip through the document -- do you have it?

24 A. Yes. I put the wrong one aside.

25 Q. If you just flip to page 12. In this footnote on

Capdcol5

Tabor - direct

1 related-party transactions, this contains the representation  
2 that the related-party debt has now been paid off, correct?

3 A. I see that, yes.

4 Q. Now, did you yourself look at these two audited financial  
5 statements in connection with this LBO transaction?

6 A. I certainly remember looking at the 2003 financials in the  
7 early stages of our diligence or at some point in our  
8 diligence. I don't specifically remember looking at the 2004  
9 financials but I may have.

10 Q. Why did you look at the 2003 financials?

11 MR. SCHWARTZ: Objection, your Honor.

12 THE COURT: The same objection?

13 MR. SCHWARTZ: Yes. And I anticipate the ruling.

14 THE COURT: The same ruling.

15 You may answer it, sir.

16 THE WITNESS: OK.

17 A. We wanted to see what debt was disclosed, and we wanted to  
18 look at footnotes because the footnotes disclose things like  
19 related-party transactions.

20 Q. Now, with respect to the -- going back to the EPMA, with  
21 respect to the representations and warranties --

22 I think we can take that down, Mr. Smith. Thank you.

23 -- fair to say that most of the representations and  
24 warranties provide for schedules to be attached to the EPMA in  
25 which disclosure of relevant items can be made?

Capdcol5

Tabor - direct

1 A. Yes, that's right.

2 Q. Let me ask you with respect to the schedules in this EPMA,  
3 who drafted them?

4 A. I don't know specifically who drafted them. I know they  
5 were sent to us by someone at Mayer Brown.

6 Q. And I'll ask you to take a look at Government Exhibit 711,  
7 which I'll offer.

8 MR. SCHWARTZ: To which we will not object to.

9 THE COURT: Received.

10 (Government's Exhibit 711 received in evidence)

11 BY MR. CHERNOFF:

12 Q. Mr. Tabor, do you see that this is an e-mail to Mr. Westra,  
13 to yourself, copying Mr. Collins, from Paul Koury at the Mayer  
14 Brown firm?

15 A. Yes.

16 Q. And it states on the next page: "Attached, please find a  
17 clean and black line version of the revised schedules to the  
18 Equity Purchase Agreement.

19 "Please note that these schedules are being delivered  
20 simultaneously to our client and internally at MBR&M for review  
21 and are therefore subject to further comments."

22 A. Yes, I see that.

23 Q. And, by the way, Mr. Tabor, at this point had the law firm  
24 Mayer, Brown & Platt changed its name to Mayer, Brown, Rowe &  
25 Maw?

Capdcol5

Tabor - direct

1 A. That is my understanding.

2 Q. And attached follow, as is represented in the e-mail, what  
3 appear to be draft versions of the schedules that were  
4 ultimately included in the EPMA?

5 A. Yes, that's right.

6 (Continued on next page)

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CAPPOL6

Tabor - direct

1 BY MR. CHERNOFF:

2 Q. Let me go back to the EPMA for a moment, Government  
3 Exhibit 1005.1, Page 23, and you'll see an Article 5 there  
4 concerning covenants?

5 A. Yes.

6 Q. Was this language that your client saw? Oh, sorry. Let me  
7 just wait for it to come up on the screen. Page 23. That  
8 should be Bates 46, if that's better. Okay.

9 And in the middle of the page, Mr. Tabor, do you see  
10 language here that concerns the distribution of funds to  
11 include the 500 million in excess working capital that we  
12 talked about and the payoff of the purported amount of debt  
13 from RGHI to Refco?

14 A. Yes, I see that.

15 Q. And was this language your client sought?

16 A. Yes.

17 Q. Do you recall whether you discussed the funds'  
18 disbursements -- these funds' disbursements with Mr. Collins  
19 specifically?

20 A. When you say "these funds' disbursements," do you mean the  
21 distribution or dividend and how it was going to be funded --

22 Q. Yes.

23 A. -- partially out of the debt, the elimination of the debt  
24 from shareholder? Yes, I do recall discussing that with him.

25 MR. CHERNOFF: Could we bring up Government

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Tabor - direct

1 Exhibit 321, which we'll offer pursuant to our stipulation  
2 concerning the handwriting of the defendant?

3 THE COURT: Received.

4 (Government's Exhibit 321 received in evidence)

5 MR. CHERNOFF: Your Honor, may I just read this  
6 because this is in the handwriting of the defendant.

7 "Refco/Royce, April 16th, 2004, telephone from Jay  
8 Tabor. Okay to distribute the 120 million accrual for client,"  
9 et cetera. And then there's a reference to 12 million in cash.

10 A. Yes.

11 Q. That was the amount that was going to be used -- I'm sorry,  
12 the 120 minus the 12 to pay off all of the purported debt from  
13 RGHI?

14 A. That's right.

15 Q. Let's look at section 1005.1 of the EPMA, please, which is  
16 Page 28. Government Exhibit 1005.1. Did I misspeak? Okay.  
17 Segregation of funds.

18 Mr. Tabor, is this the language that you sought with  
19 respect to setting aside or segregated the half a billion  
20 dollars in purported excess working capital?

21 A. Yes, it is.

22 Q. Did you have an understanding that after the signing of  
23 this agreement, Refco was going to set up a segregated account?

24 A. Yes.

25 Q. Did anyone ever tell you that this account was actually

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Tabor - direct

1 funded by a \$390 million overdraft that Refco took from -- that  
2 was given by BAWAG?

3 A. No.

4 Q. Let me now ask you, I think there's an excerpt of your  
5 notes at Government Exhibit 702. Do you have that document  
6 before you?

7 A. Yes.

8 MR. CHERNOFF: Government offers 702. Can I ask a  
9 question while you --

10 MR. SCHWARTZ: You can have the document. No  
11 objection.

12 THE COURT: Received.

13 (Government's Exhibit 702 received in evidence)

14 Q. I'm sorry, Mr. Tabor. I've lost track of where I was. Let  
15 me back up.

16 I want to focus on the period right before the closing  
17 because I'm going to ask you about a specific transaction. Let  
18 me just ask you about the period leading up to the actual  
19 closing where the deal was signed.

20 A. I'm sorry, I just want to make sure you understand the  
21 difference between the signing and closing. They're two  
22 different point of times.

23 Q. I'm sorry. In my haste, I misspoke. Just before the  
24 signing of the EPMA.

25 A. Okay.

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Tabor - direct

1 Q. Not the closing.

2 A. Okay.

3 Q. Could you describe what that period was like terms of the  
4 work being done?

5 A. It was really busy. We were trying to finalize this EPMA,  
6 as you refer to it, and various things that went with it.  
7 There were -- This was the point in time where we also got a  
8 request from Mr. Collins, the subject of these notes that you  
9 asked me to look at.

10 Q. And did you have a discussion around that time with concern  
11 to -- with respect to Mr. Bennett's co-owner of RGHI and of  
12 Refco, Tone Grant?

13 A. Yes, we did.

14 Q. What was Tone Grant's role in the company at that time?

15 A. Well, as we understood it, he was a 50 percent owner of  
16 RGHI, but we did not really think he had a role in the company,  
17 as far as operations.

18 Q. And what did your client require with respect to Mr. Grant?

19 A. They required that Mr. Grant's ownership be completely  
20 extinguished, that essentially Mr. Bennett buy him out so that  
21 Mr. Grant would no longer be an owner of RGHI going forward  
22 and, therefore, no longer an indirect owner of Refco.

23 Q. And what, if any, requests did you receive before the EPMA  
24 was signed with respect to Mr. Grant?

25 A. Well, Mr. Collins called me and asked if Lee might

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Tabor - direct

1 reconsider that requirement because, as I recall, he said that  
2 Mr. Grant believed that this company was very attractive; that  
3 there might be an initial public offering coming down the road.  
4 He didn't really want to sell.

5 And so Mr. Collins indicated that the concern was that  
6 if they had to buy him out, or if Mr. Bennett did, they would  
7 not be able to do so at a price that was reasonable; that it  
8 would be an unreasonable price, or something to that effect.

9 Q. And when you had this discussion with Mr. Collins, was that  
10 on the phone or in person?

11 A. No, it was on the phone.

12 Q. And did you take notes of that conversation?

13 A. Yes.

14 Q. And that's what's been admitted as Government Exhibit 702?

15 A. Correct.

16 Q. How did you and your client react to the request  
17 Mr. Collins was making on behalf of Mr. Grant?

18 A. I took it -- I told Mr. Collins I would take it up with the  
19 Thomas Lee guys, and I did. And they reacted very negatively,  
20 basically indicating it was a non-starter.

21 Q. And did you communicate that back to Mr. Collins?

22 A. I did.

23 Q. Did you have an understanding as to whether Mr. Bennett  
24 then proceeded to buy out Mr. Grant?

25 A. Yes. The EPMA required that that happen as a condition to

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Tabor - direct

1 closing, and we negotiated to get a certificate from Mr. Grant  
2 indicating he no longer had an ownership interest as of the  
3 closing.

4 Q. You said you negotiated to get a certificate?

5 A. Yes, that was a closing condition built into the EPMA to  
6 get that certificate.

7 Q. Did you ask Mr. Collins whether you could see the actual  
8 agreement with Mr. Grant?

9 A. At some point leading up to the closing, I asked him if he  
10 intended to share it with us, and he indicated that he did not.  
11 He pointed me back to the provisions in the EPMA that indicated  
12 we would get a certificate from Mr. Grant saying he no longer  
13 had an interest.

14 Q. Let me ask you to look at Government Exhibit 1005.29 and  
15 tell me when you're there.

16 A. I'm there.

17 Q. Is that the certificate you received concerning Mr. Grant's  
18 being bought out, as I'll say?

19 A. Yes.

20 MR. CHERNOFF: Government offers 1005.29.

21 MR. SCHWARTZ: No objection.

22 THE COURT: Received.

23 (Government's Exhibit 1005.29 received in evidence)

24 Q. Let me now show you Government Exhibit 1005.28, which I  
25 believe is in evidence. This is titled: A stock purchase

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Tabor - direct

1 agreement?

2 A. Yes, I see it.

3 Q. And did you see it's between Mr. Bennett and Mr. Grant?

4 A. Yes.

5 Q. This is the agreement you'd asked Mr. Collins if you could  
6 have, and he said he didn't intend to share it with you?

7 A. That's right.

8 Q. When was the first time you saw this stock purchase  
9 agreement between Mr. Bennett and Mr. Grant?

10 A. It was years after Refco blew up.

11 Q. And let me ask you to look at Page 2, which makes reference  
12 to a cash amount which is defined as \$4 million plus the  
13 estimated tax amount.

14 A. Yes.

15 Q. What was your reaction upon learning that Mr. Grant only  
16 received \$4 million plus an estimated tax amount for his  
17 ownership interest in Refco?

18 MR. SCHWARTZ: Objection, misstates the document.

19 MR. CHERNOFF: May I have a moment, your Honor?

20 THE COURT: Yes.

21 MR. CHERNOFF: I think I understand the objection,  
22 your Honor.

23 Q. Mr. Tabor, is there also a deferred amount that's  
24 referenced on Page 2?

25 A. Yes, there is.

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Tabor - direct

1 Q. I won't ask you to calculate it, but with respect to the  
2 cash amount of \$4 million that Mr. Grant -- plus the estimated  
3 tax amount that Mr. Grant was receiving, how did you react upon  
4 learning of this document, of its provisions?

5 MR. SCHWARTZ: Objection to his reaction.

6 Q. Let me be more focused. What was your reaction in the  
7 context of what you'd understood about the deal for Mr. Grant's  
8 interest in Refco?

9 MR. SCHWARTZ: Objection.

10 THE COURT: Basis, please?

11 MR. SCHWARTZ: Relevance, your Honor. He's already  
12 stated what he expected. The document speaks for itself. His  
13 reaction has no relevance, no relevance to any issue.

14 THE COURT: I think he's entitled to say whether it  
15 was consistent or inconsistent, right?

16 MR. CHERNOFF: Shall I rephrase, your Honor, and try  
17 it again?

18 THE COURT: Yes.

19 Q. When you learned of this document, did it comport with your  
20 understanding of what Mr. Grant would receive, based on your  
21 discussions and negotiations of the deal with Refco?

22 A. No.

23 Q. How not?

24 A. I had understood from Mr. Collins that it was going to be  
25 difficult to negotiate a purchase with Mr. Grant at a price

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Tabor - direct

1 that was reasonable, and we understood that Mr. Grant owned  
2 half of RGHI, which owned 90 percent of Refco, which our client  
3 was paying a ton of money for, so we expected this to be  
4 hundreds of millions of dollars.

5 Q. And who was representing RGHI and Mr. Bennett in the buyout  
6 of Mr. Grant?

7 A. I think Mr. Collins was.

8 MR. CHERNOFF: Could we bring up Government  
9 Exhibit 1250C. In case that's not in, we offer it as the  
10 billing records from Mr. Collins.

11 MR. SCHWARTZ: No objection.

12 THE COURT: Received.

13 (Government's Exhibit 1250C received in evidence)

14 MR. CHERNOFF: And could we -- Let me just pose a  
15 question to the witness.

16 Q. Mr. Tabor, do you see this is a detailed report by matter?  
17 I know this is not your firm, but this is the kind of thing  
18 that lawyers use to keep track of their hours when they work  
19 with clients?

20 A. It looks like it to me.

21 MR. CHERNOFF: Let me ask Mr. Smith if we could go to  
22 Bates number ending 773 and 774. And, sorry, if we could zoom  
23 back out, Mr. Smith. And if we could just highlight on the  
24 right-hand -- actually, the bottom part of the screen there's  
25 some dates that begin with July 15th. It's actually above

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Tabor - direct

1 that, July 13th.

2 And I'll just note for the record, your Honor, that on  
3 July 13th, and I apologize I'm reading from the screen because  
4 I don't have my highlighted version, it says "Various comps on  
5 open issues including Grant agreement."

6 The next entry, July 14th. Thank you, Mr. Smith.  
7 "Comps regarding and revising Grant agreement."

8 July 15th, "Reviewing and revising Grant's agreement."

9 And then I think the next page is 774 and the middle  
10 of the page, around July 26th, "Changes to credit agreement and  
11 Grant agreement." Thank you, Mr. Smith.

12 Q. The Grant stock purchase agreement that we've just been  
13 looking at, did it come to your attention at some point that  
14 that agreement made it into the closing binder that was  
15 prepared in connection with this deal?

16 A. Yes, it did.

17 Q. Were you aware, prior to the collapse of Refco, that that  
18 was in the closing binder?

19 A. No.

20 Q. Had you ever seen the Grant stock purchase agreement prior  
21 to the collapse at Refco?

22 A. No.

23 Q. Had anyone brought it to your attention that it was on a  
24 shelf in a closing binder at Weil?

25 A. No.

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Tabor - direct

1 Q. Let me now advance ahead to the closing itself. What  
2 generally had to be done between the signing of the EPMA and  
3 the closing?

4 A. A number of things. There were regulatory approvals that  
5 had to be obtained, financing had to be completed, and there  
6 were various documents had to be delivered at closing that had  
7 to be completed, cleared with the other side and executed and  
8 delivered.

9 Q. And did you have any role in that?

10 A. Yes, I did.

11 Q. What was your role?

12 A. I was the main partner on the Weil side; so I was overall  
13 responsible.

14 Q. And where did that closing take place?

15 A. It took place in Weil's office here in New York.

16 Q. Now, skipping ahead with some large chunks of time. After  
17 this closing, there was ultimately an IPO in which Refco stock.  
18 The Refco majority now being told by Thomas H. Lee, was sold to  
19 the public?

20 A. That's correct.

21 Q. And did you go any legal work for Thomas H. Lee, any  
22 significant work from the time of the closing to the IPO?

23 A. Not other than there were some mechanical restructurings  
24 that needed to be done to get entities in the right form to do  
25 the IPO, and that had all been pre-negotiated as part of the

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Tabor - direct

1 LBO and the shareholder agreement with Mr. Bennett.

2 So I did oversee that work, but it was mechanical. It  
3 wasn't the offering work itself.

4 Q. And were you still, at that time, working out of the firm's  
5 Dallas office?

6 A. Yes.

7 Q. After the closing, did your firm do additional work for  
8 Refco?

9 A. After the LBO closing?

10 Q. Yes.

11 A. Yes, I believe we worked on the IPO. "We" as a firm.

12 Q. And after the collapse of Refco, did your firm continue to  
13 represent Thomas H. Lee in connection with other matters?

14 A. Yes.

15 Q. Have you, yourself, been personally involved in any of  
16 those representations of Thomas H. Lee?

17 A. Not subsequent to the blowup of Refco, no.

18 Q. And, Mr. Tabor, have you given depositions and other  
19 testimony in connection with the litigation following the  
20 collapse of Refco?

21 A. Yes.

22 Q. Did there come a time after the events we've been talking  
23 about, after the closing of the LBO, that you learned that the  
24 defendant, Mr. Collins, was disputing whether you and he had  
25 ever had a conversation about due diligence on or about

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Tabor - direct

1 March 23rd, 2004?

2 A. Yes. I learned that years later, as part of some  
3 proceeding.

4 Q. Have you personally seen or heard any of his testimony on  
5 that subject?

6 A. No, I have not.

7 MR. CHERNOFF: Your Honor, at this time, the  
8 government offers prior testimony of the defendant, Government  
9 Exhibit 2206 and 2207.

10 THE COURT: Yes, sir. Received.

11 (Government's Exhibit 2206, 2207 received in evidence)

12 MR. CHERNOFF: Prior testimony of Joseph Collins:

13 "Q. There were some drafting sessions in connection with  
14 something called a letter of intent on April 9 and April 15,  
15 2004. Did you attend those?

16 "A. Yes, I did.

17 "Q. Who was present at those meetings?

18 "A. I believe that -- I can't name every person there. I know  
19 Mr. Bennett attended, I attended. At the first meeting, I  
20 believe Lawrence Goldberg and Joe Beluso from Credit Suisse  
21 were there, and Mr. Westra and Mr. Tabor were there.

22 Mr. Schoen, I believe Mr. Jaeckel from Lee was there, and there  
23 were a few other participants from Lee that I don't know, and  
24 an investment banker for Lee that I can't remember.

25 "Q. You mentioned Mr. Tabor and Mr. Westra. Were those both

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Tabor - direct

1 lawyers for Weil Gotshal, the law firm representing Lee, who  
2 testified at this proceeding?

3 "A. Yes, they were.

4 "Q. Had you ever met them before these April meetings?

5 "A. No, that was the first time I met them.

6 "Q. Had you ever spoken with them on the phone previously?

7 "A. No, I hadn't. That was the first time.

8 "Q. What about in March of that year, had you ever spoken with  
9 them on the phone or met with them in March of 2004?

10 "A. No, I didn't."

11 Your Honor, I'm now on Government Exhibit 2207, prior  
12 testimony of Joseph Collins:

13 "Q. You heard Mr. Tabor testify that he had been on phone calls  
14 with you about diligence in March; do you remember that?

15 "A. I remember that, yes.

16 "Q. Were you involved in any phone calls with him about  
17 diligence in March?

18 "A. No, I was not."

19 Your Honor, Government Exhibit 2205 is videotaped  
20 testimony of the defendant, which we offer. We have a  
21 transcript prepared from that videotape.

22 THE COURT: Received.

23 (Government's Exhibit 2205 received in evidence)

24 THE COURT: And are you offering the transcript as an  
25 aid or as evidence itself?

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Tabor - direct

1                   MR. CHERNOFF: I think as evidence itself because it  
2 was prepared by the reporter.

3                   THE COURT: Thank you.

4                   MR. CHERNOFF: And so Mr. Levy is handing that out,  
5 and then we're going to play the videotape.

6                   THE COURT: Does everybody have one, friends?

7                   MR. CHERNOFF: Thank you, your Honor.

8                   (Video being played)

9                   MR. CHERNOFF: Thank you, your Honor.

10                  BY MR. CHERNOFF:

11                  Q. Mr. Tabor, at the time that you learned that Mr. Collins  
12 was in certain litigation disputing that you had a  
13 March 2004 -- March 23rd, 2004, conversation about due  
14 diligence, where were those note pads that I've provided you  
15 with today?

16                  A. They were in custody of Weil lawyers in New York who had  
17 had them since shortly after the blowup back in 2005.

18                  Q. And did you have some understanding that, by that point,  
19 copies of them had been produced to various parties in  
20 litigation from the bankruptcy of Refco?

21                  A. That was my understanding, yes.

22                  Q. And the copies had been produced to the U.S. Attorney's  
23 Office?

24                  A. Yes.

25                  Q. And your billing records for that same time period, you had

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Tabor - direct

1 furnished to the same parties?

2 A. That's my understanding.

3 Q. Let me ask you about your billing records. What do those  
4 generally reflect?

5 A. When you say what do they reflect, you mean --

6 Q. Why do you have them? What do you put in the detail?  
7 What's your purpose --

8 A. They're descriptions. They're ultimately used for bills  
9 that get sent to clients.

10 Q. And do you enter on them details about the kind of work you  
11 did on a given day?

12 A. Ordinarily, if I bill any time on a given day, I'll put  
13 some description of what I was doing.

14 Q. And why do you put that kind of detail?

15 A. Just so the client can see what they're paying us for, if  
16 we're billing them for something.

17 Q. Now, in preparation for your testimony today, did I ask you  
18 to sit with me and Postal Inspector Clark, who's actually  
19 stepped out at the moment, to review those note pads?

20 A. Yes.

21 Q. And did I ask you to compare your original note pads with  
22 the billing records that you prepared and kept during the same  
23 time period that we looked at?

24 A. Yes, you did.

25 Q. And did I ask you to compare your notes to the detail you

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Tabor - direct

1 entered in the billing records to see if there was any  
2 correspondence between the two sets of documents that reflected  
3 a chronology?

4 A. Yes.

5 Q. And did you, in fact, tab up those two note pads with  
6 respect to some potentially relevant entries?

7 A. I did I put some tabs.

8 Q. Okay. Let me ask you to take out the first book or first  
9 note pad. I should say Government Exhibit 781.

10 A. I'm trying to find the pad with tabs.

11 THE COURT: Is that the one in the corner?

12 A. There it is.

13 Q. And if you could hold it up, please?

14 A. Okay.

15 Q. Since the time that you had it, there's been some nylon  
16 ties added into the holes to keep that together?

17 A. Yes. Since the time that I last had this, it was in actual  
18 pads. I mean, the pages have been taken out, but the ties have  
19 been added to --

20 Q. So that somewhere between when you had it and when in the  
21 copies were provided, the pad was taken apart?

22 A. Right.

23 Q. For whatever purpose, to be copied or whatever?

24 A. Right.

25 Q. Okay. So let me ask you now to look at the first tab.

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Tabor - direct

1                   MR. CHERNOFF: And, Mr. Smith, this is Bates number  
2 049, and can we also bring up Government Exhibit 178. We'll  
3 try to do it side by side. Page 642 on the Bates numbers  
4 and -- I'm sorry, before we do that, let's just leave that  
5 first page up just a minute.

6 Q. Mr. Tabor, Government Exhibit 178 is a bill from Weil  
7 Gotshal to Thomas Lee Partners dated August 9, 2004?

8 A. Okay.

9 Q. Do you see that? I don't know if you have the document.

10 A. Yes. Yes, I see it.

11 Q. And that's for professional services rendered in connection  
12 with project Royce for the period through July 31st, 2004,  
13 correct?

14 A. Correct.

15                   MR. CHERNOFF: Government offers 178.

16                   MR. SCHWARTZ: No objection.

17                   THE COURT: Received.

18                   (Government's Exhibit 178 received in evidence)

19                   MR. CHERNOFF: And, Mr. Smith, if we could advance  
20 ahead to 642.

21 Q. So looking, when we're there, Mr. Tabor, what, if anything,  
22 in your notes, if you can read them to us --

23 A. Yeah.

24 Q. -- relates to the time you entered for February 27, 2004?

25 A. Again, the date on these notes, February 27th, I refer to

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Tabor - direct

1 the call with the Lee company. I mentioned George, Scott  
2 Schoen and Max, those are all Lee people.

3 Q. And when you say the date on the notes, that's in the upper  
4 left-hand corner?

5 A. Yes.

6 Q. February 27th?

7 A. Right.

8 Q. Okay. Tab 2A, is that the next page in this note pad?

9 A. Yes.

10 Q. And we're going to bring up the billing records from  
11 March 1st, 2004, and so what, if anything, on the notes that  
12 you tabbed --

13 MR. CHERNOFF: I'm sorry, Mr. Smith. It's 050 on the  
14 notes. And, your Honor, the print is a little small on the  
15 side by side; so we'll make an effort to blow it up.

16 THE COURT: Yes, sir.

17 Q. Mr. Tabor, what, if anything, on the notes on the left-hand  
18 side relate to time that you billed in the billing records on  
19 the right-hand side, and tell us where to find that and  
20 we'll --

21 A. Yeah, just one second.

22 Q. Absolutely.

23 A. Okay. This -- On the -- I think we're on a different page  
24 here, though, because I think it should be the 1st of March. I  
25 don't see any time for me on that page, for the 1st of March.

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Tabor - direct

1 Q. Sorry. We might be on the wrong page.

2 MR. CHERNOFF: Could we go to 45, Mr. Smith.

3 Q. And at the top, you'll see your time for March 1st.

4 A. There we go.

5 Q. And we'll blow that up.

6 A. So the initial part of the time description there,  
7 "preparing for and participating in telephone conference with  
8 Westra and Conrad Bahlke regarding regulatory compliance  
9 diligence."

10 Q. A little slower, Mr. tabor. Our court reporter is typing  
11 as fast as she can.

12 A. The language saying, "Prepare for and participate in  
13 telephone conference with Westra -- with J. Westra and C.  
14 Bahlke regarding regulatory compliance and diligence." So  
15 that, really the first four or five lines there of that  
16 description --

17 Q. Yes.

18 A. -- are referring to this conference call with the Weil  
19 group.

20 Q. With the Weil group on the left-hand side?

21 A. Yes.

22 Q. Okay. Now, if you could keep turning through that note pad  
23 in order. I think about five pages, six pages on, you have a  
24 Tab 2B?

25 A. Correct.

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Tabor - direct

1                   MR. CHERNOFF: Okay. And we can leave the same  
2 billing records up. What, if anything on the page -- I'm  
3 sorry, Mr. Smith. It's Page 55 on the Bates. We're there.  
4 Great.

5 Q. What, if anything, on what you tabbed as 2B relates to  
6 detail that you entered on the billing records?

7 A. The last part of it, starting about five or six lines up,  
8 it says, "Telephone conference with D. Klejna, J. Westra and C.  
9 Bahlke and others regarding litigation and compliance matters."

10 Q. And I'm sorry --

11 A. It stops there; so it's --

12                  MR. CHERNOFF: Could we blow that up on the billing  
13 records? Oh, we can't blow it up. All right. Too much data  
14 on the screen.

15 Q. What on the notes does that relate to, Mr. Tabor?

16 A. That's relating to this page and several pages that follow  
17 that describe our conversation with Dennis Klejna at the  
18 company about various compliance matters.

19 Q. Okay. So it looks like, at the top, your conference call  
20 with, but you forgot to write who it was with?

21 A. I didn't write who it was with. Once again, these were  
22 just for my own benefit.

23 Q. Of course. And then the language that follows on the next  
24 few pages relates to this conference call with Mr. Westra,  
25 Mr. Klejna and the others that you mentioned?

CAPPOL6

Tabor - direct

1 A. Right.

2 MR. SCHWARTZ: Could we have Bates numbers so the  
3 record is clear?

4 MR. CHERNOFF: Yes, Mr. Schwartz.

5 Q. How many pages of notes relate to that?

6 A. It's the last thing -- let's see, one, two, three, four  
7 pages. The last thing is regarding the SEC where it says you  
8 can't tell --

9 MR. CHERNOFF: That's Bates 555 to 558.

10 MR. SCHWARTZ: Your Honor, if we could have a  
11 reference to the date that he read from, the billing records.

12 THE COURT: From the billing records?

13 MR. SCHWARTZ: Yes.

14 THE COURT: The date on the billing records, sir, was  
15 that --

16 THE WITNESS: It's March 1st.

17 THE COURT: -- March 1?

18 THE WITNESS: Yes.

19 MR. CHERNOFF: Thank you, your Honor. Okay.

20 Q. So we were on Bates 58, for our reference. If you could  
21 turn three pages further into the note pad, I think there you  
22 tabbed a three?

23 A. Yes.

24 Q. And let me ask --

25 MR. CHERNOFF: That's Bates number 61, Mr. Smith.

CAPPOL6

Tabor - direct

1 Q. And let me ask you to flip -- Actually, let me ask you what  
2 you recall the notes in three relating to?

3 A. I actually had gone through a version of these time records  
4 and tabbed the time records, but that's not what I have here  
5 with me. So I apologize because I'd have to go through and  
6 figure out which time record --

7 Q. Oh, I have your tabs here so I can bring them up on the  
8 screen; so that wasn't clear.

9 MR. CHERNOFF: So let me bring up 646, Mr. Smith, on  
10 the time records, and I think here we could focus in on the  
11 time that was billed by Mr. Silverberg on March 5th.

12 A. Right.

13 Q. And what about the entry Mr. Silverberg made on March 5th  
14 relates to your notes?

15 A. Well, these are notes of the same conversation regarding  
16 the tax structure of the transaction. Mr. Silverberg is a tax  
17 partner at Weil. So I had notes of this conversation that  
18 included the tax people at KPMG, as well as some of the Lee  
19 people, and Mr. Silverberg discussing the tax transactions  
20 structure.

21 Q. And Mr. Silverberg billed some time, as we see here on the  
22 billing records, that refers to telephone conferences with  
23 Mr. Westra and yourself?

24 A. Right. And with the client and KPMG and others.

25 MR. CHERNOFF: Okay. Now, I want to advance one page,

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Tabor - direct

1 Mr. Smith, on the billing records to 647.

2 Q. And this is the same date for time on March 5th, 2004, that  
3 we just saw for Mr. Silverberg, correct?

4 A. That's correct.

5 Q. Did you bill any time for the work that you were doing with  
6 Mr. Silverberg that day?

7 A. No, I didn't bill time for that call.

8 Q. Did you forget, or you intentionally didn't bill it?

9 A. I don't recall, as I sit here now. It's not uncommon that  
10 I do something without starting my clock. I'm careful not to  
11 bill things unless I work on them, but people usually don't  
12 complain if I do something and don't start my clock.

13 Q. So whatever work you did with Mr. Silverberg that day was  
14 not charged to the client?

15 A. That's right.

16 Q. Now, on the March 5th billing records, you did bill some  
17 work that you did on this matter, correct?

18 A. That's correct.

19 Q. And I think as you -- If you move ahead in your note pad  
20 three pages, you've placed a Tab 4?

21 A. Correct.

22 Q. Do you see that?

23 MR. CHERNOFF: And that's Bates number 64 on the  
24 notes, Mr. Smith. I'm sorry.

25 Q. Okay. So what, if anything, on the notes we see on the

CAPPOL6

Tabor - direct

1 left-hand relate to the time that you billed on March 5th of  
2 2004?

3 A. The highlighted entry portion there, it says, "Prepare for  
4 and participate in call with Refco management regarding" --

5 THE COURT: Slowly.

6 A. -- "diligence" -- I'm sorry?

7 THE COURT: Slowly. "Diligence."

8 A. Okay. I'm sorry. "Regarding diligence, regulatory capital  
9 matters."

10 Q. And we see that in the billing records. What in your notes  
11 relate to that time billed on March 5th?

12 A. The notes that start here that show that the names of the  
13 people at the top and say "regulatory capital call" and go to  
14 the next few pages.

15 Q. And the reference to Rob and Phil, I gather, are Robert  
16 Trosten and Phillip Bennett of the Refco company?

17 A. Correct.

18 Q. And then you wrote "capital call to" --

19 A. "Regulatory capital call," yes.

20 Q. Okay. And in the pages that follow in this note pad,  
21 there's some notes concerning that call?

22 A. Yes. It looks like one, two, three, four, five, six -- six  
23 pages.

24 Q. I think that takes us to Bates number 69, for the record.

25 A. Right.

CAPPOL6

Tabor - direct

1 Q. Okay. So let's turn two pages further from that, where I  
2 believe you posted a Tab 5.

3 MR. CHERNOFF: And this is Bates No. 72, Mr. Smith.

4 A. Correct.

5 MR. CHERNOFF: And I'll ask that you bring up the  
6 billing detail for time you billed on March 9, 2004. This is  
7 Bates 648, Mr. Smith. Okay.

8 A. Okay.

9 Q. I'm not going to ask you to read those notes, but tell me  
10 what here relates to time you billed to your client on  
11 March 9th?

12 A. Well, if you look at the top of this page, I know it's hard  
13 to see, it says, "Call with KPMG Francois," and then there's  
14 other stuff here that talks about Conrad, and it goes into a  
15 discussion of regulatory capital.

16 That corresponds to the billing entry for the 9th, or  
17 at least the first part of it. "Telephone conference with," it  
18 should be "C. Bahlke," Conrad Bahlke, and "F," that's Francois,  
19 "Cooke of KPMG regarding regulatory capital requirements."

20 Q. Okay. Now, I want you to turn ahead further into this note  
21 pad. We're still in the first note pad, correct?

22 A. Correct.

23 Q. And Tab 6 is the same one you tabbed Tab A with reference  
24 to our conversation earlier about the phone call you had with  
25 the defendant on March 23rd, correct?

CAPPOL6

Tabor - direct

1 A. Correct.

2 MR. CHERNOFF: And if we could just bring up the  
3 March 23rd notes. I'm sorry, Bates number 85. We can take  
4 down the right-hand side to make room here.

5 Q. These March 23rd notes, Mr. Tabor, is this another instance  
6 where you failed to bill your client any time for this work?

7 A. That's right.

8 Q. What were you doing on March 23rd? Were you in Dallas, in  
9 New York? What do you recall?

10 A. I was in New York, mainly at a client's offices in  
11 meetings.

12 Q. A different client?

13 A. Yes, a different client.

14 Q. And approximately how many hours did you work that day for  
15 another client in New York?

16 A. Well, I think there were two different ones. I know one  
17 was over eight hours, and I think the other one was two or  
18 three hours.

19 Q. And your answer, I assume, is based on your review of your  
20 billing records from March 23rd?

21 A. Correct.

22 Q. And so however much time you spent on the March 23rd call,  
23 you did not bill your client for that particular phone call?

24 A. That's right. Although, I see some other people mention me  
25 in billing records, but I didn't bill anything.

CAPPOL6

Tabor - direct

1 Q. And looking at the notes, this is what you described  
2 earlier today as the conversation on due diligence, that was  
3 just yourself and Mr. Collins?

4 A. That's right.

5 Q. And you began by writing, "Joe will push to get responses  
6 to our open requests"?

7 A. Correct.

8 Q. I think a little further down on this page it says, "Joe  
9 confirms that"?

10 A. Yes.

11 Q. Something, what does that say?

12 A. Company confirmed -- I'm sorry, "Joe confirms that  
13 company," it says "no payee." I meant, "not payee of debt  
14 other than customer receivables arising in ordinary course of  
15 business, receivables on balance sheet -- on balance sheet from  
16 customers in ordinary course, company has gone through with  
17 accountants."

18 Q. Great.

19 MR. CHERNOFF: Mr. Smith, could we just highlight also  
20 the word "debt" up there by one.

21 Q. Mr. Tabor, let's look at the next page of these notes,  
22 Bates 86. What in your notes here relate to what you told us  
23 you remember of your conversation with Mr. Collins on that  
24 date, March 23rd, 2004?

25 A. No. 5 at the bottom, which is "stock options, et cetera."

CAPPOL6

Tabor - direct

1 Q. And that was the part of the conversation where you asked  
2 whether anyone had an option or any entity had an option to  
3 acquire stock or equity in Refco?

4 A. Right.

5 Q. And you wrote, "Joe says Phil confirms none exist"?

6 A. Right.

7 Q. Let's take a look at the next page, please, Bates 87.

8 Anything here that relates to the topics you told us you  
9 recalled discussing with Mr. Collins on March 25th?

10 A. Yes, Item 6.

11 MR. CHERNOFF: Can we highlight Item 6, Mr. Smith?

12 Q. And what does that say or --

13 A. Yeah, I use abbreviations, but "K" is contract,  
14 "contract/arrangements with Phil/RGHI or affiliates. Joe  
15 confirmed with Phil that none exist other than Phil's Comp.  
16 arrangements," and that says, "make sure no written comp  
17 exists, question mark, Joe confirms" -- I'm sorry. I need to  
18 repeat that last part. "Make sure no written comp agreement  
19 exists, question mark, Joe confirms."

20 MR. CHERNOFF: And could we look at the next page,  
21 Mr. Smith, Page 88.

22 Q. Are we still on notes concerning the call to Mr. Collins?

23 A. Yes.

24 Q. What were you talking about in reference to these notes?

25 A. We were just going through the list of the acquisitions

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Tabor - direct

1 that Refco had done that we had seen documents for in the data  
2 room to make sure that we had seen everything.

3 Q. And the next page, Page Bates 89. Still part of the  
4 conversation, still notes on it?

5 A. Yes.

6 Q. Let's look at Page 90, is this the last page of notes that  
7 you have on that --

8 A. Yes.

9 Q. -- conversation? And what here in the notes relate to what  
10 you told us you remember about how the conversation wound up?

11 A. Two things. The language at the top, it says, "Joe to  
12 arrange for call with Dennis K," Dennis Klejna, "and Rob T,"  
13 Rob Trosten, "as well to go over remaining diligence questions  
14 to be scheduled separately."

15 That was the call I had mentioned that we were trying,  
16 for various reasons, to get set up. So that's the first part.

17 Q. And the second part?

18 A. "Still need to get info re: SEC inquiry status, background,  
19 et cetera. This to be scheduled separately." That's referring  
20 to the Sedona matter we talked about.

21 Q. Is this the end of the notes you took on your March 23rd  
22 call with Mr. Collins?

23 A. Yes.

24 Q. And to be clear, this appears to be what Mr. Collins  
25 testified, and what we just saw on the screen, as never having

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Tabor - direct

1 occurred?

2 A. That's my understanding.

3 MR. CHERNOFF: Your Honor, I have a few more entries  
4 in the next notebook. I can try to finish them.

5 THE COURT: What do you want to do, ladies and  
6 gentlemen, do you want to finish the entries and then break or  
7 what?

8 JUROR: Finish.

9 THE COURT: Finish the entries.

10 MR. CHERNOFF: Thank you, your Honor.

11 THE COURT: Thank you, ladies and gentlemen.

12 Q. Okay. So, Mr. Tabor, with respect to relations in time and  
13 the chronology of the note pad, mine is pulled apart, but if  
14 you could just hold up the first notebook, 781, we're now at  
15 the end of that on the course of notes that you took on this  
16 deal?

17 A. Right.

18 Q. And going to Exhibit 782, is that next note pad that you  
19 took, book No. 2?

20 MR. CHERNOFF: This is in evidence, and I'll ask  
21 Mr. Smith to bring up the page. Thank you, Mr. Smith.

22 A. Okay.

23 Q. You have book No. 2?

24 A. Yes.

25 Q. And is this the next book that you -- I keep saying "book,"

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Tabor - direct

1 but the next note pad you picked up to take notes on the Royce  
2 deal?

3 A. Yes.

4 Q. Okay. I think one page in, on Tab 7, which is Bates number  
5 140, you took some notes that you talked about earlier today  
6 because this was also Tab B relating to the March 30th call  
7 with Refco, correct?

8 A. Correct.

9 Q. And this is the call that you think Mr. Collins may well  
10 have been on, but you're not a hundred percent sure?

11 A. That's right. I'm not a hundred percent sure.

12 Q. And we see that you listed as a participants Dennis Klejna,  
13 Mr. Trosten and Phillip which I presume is Bennett?

14 A. Correct.

15 MR. CHERNOFF: And let me ask you now if we could  
16 bring up on the billing records the time on Page 58. Here, if  
17 we could highlight the time on March 30th for Mr. Tabor.

18 Q. Mr. Tabor, one of the titles that you billed on on  
19 March 30th relates to the call that you took notes on on  
20 March 30th?

21 A. It's language -- I think it's difficult for you to  
22 highlight it precisely there, but starting in the line that you  
23 highlighted after the semi colon, it says, "Telephone  
24 conference with P. Bennett, R. Trosten, D. Klejna, C. Bahlke  
25 and D. Gewirtz regarding diligence items."

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Tabor - direct

1 Q. And let's look back at the notes now.

2 MR. CHERNOFF: If we could, for the sake of blowing up  
3 the notes, take down the billing records.

4 Q. You testified earlier today about the subjects that were  
5 discussed in the March 30th call. Just take us briefly through  
6 the notes and tell us what entries here relate to the subjects  
7 you told us were discussed on the call?

8 A. Okay. Very briefly, "debt," and we've got confirmation  
9 from Mr. Bennett that there wasn't any, except that had been  
10 provided to us, and he mentioned the \$16 million wholly  
11 internal piece.

12 Q. Let's talk about that, the debt. That's where you wrote 16  
13 million and wholly?

14 A. "Interco," just among the Refco companies themselves, not  
15 with shareholders.

16 Q. Okay. Next page is Bates 141, anything there?

17 A. Yes. At the top of the page, "agreements among owners."

18 Q. And how did the notes you took there relate to what you  
19 told us you talked about on March 30th with the Refco  
20 representatives?

21 A. There's some scribbling here, but if you look at the left  
22 margin, it says "fairly standard agreements," and then there's  
23 an arrow that says "not impacting Refco at all, only a remote  
24 entity through which Phil, Grant, BAWAG own interest in Refco,  
25 RGHI." I think what I wrote down is like mistaken because they

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Tabor - direct

1 didn't all own an interest in RGHI.

2 Q. Page 3, which is Bates 142, and what, if anything, on this  
3 page consists of notes that relate to the subject you told us  
4 were discussed in the call?

5 A. I don't think we talked about any of this stuff earlier.

6 Q. "Customer K" relates to customer contracts?

7 A. Correct.

8 Q. Go ahead and look at the next page, 143. What were you  
9 talking about as your notes reflect here?

10 A. I don't think -- None of the stuff I mentioned earlier, I  
11 think, is relevant for these, for this page of notes.

12 Q. These were other due diligence requests?

13 A. Other things we asked about.

14 Q. 144, anything there that you talk about, or are these just  
15 other routine notes?

16 A. These are other intellectual property and real estate and  
17 things like that, there was other categories of things.

18 Q. Okay. And the next one, page 45?

19 A. No. 11.

20 Q. Mmm, hmm.

21 A. "No outstanding stock options, warrants, et cetera" at the  
22 top of the page there.

23 Q. And remind us what you told us you talked about that  
24 relates to that entry on your notes?

25 A. I asked if there were any stock options or other rights

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Tabor - direct

1 anybody had to become an owner of Refco, and Mr. Bennett said  
2 that there were no such rights.

3 Q. Next page, Page 46, please?

4 A. No. 14 at the top of the page.

5 Q. Yes?

6 A. "No other material contracts," and then it says, "No  
7 contracts, arrangements between company and Phil or his  
8 affiliates except for compensation he gets in ordinary course,"  
9 and I have an arrow, something, "salary, check what bonuses he  
10 gets, no employment agreement as such, question, no."

11 Q. Thank you. Page 47?

12 A. This is bottom of 46 and top of -- and all this on 47 deals  
13 with the SEC investigation.

14 Q. The Sedona matter?

15 A. The Sedona matter, yes.

16 Q. And tell me when we get to the end of your notes on that  
17 call?

18 A. That's the last page that's on the screen there.

19 Q. Page 47?

20 A. Yes.

21 Q. Okay. So let me ask you now to flip one, two, three -- six  
22 more pages into this note pad. You placed a Tab 8, I believe,  
23 and I'll ask that we bring up in the billing records,  
24 Government Exhibit 178, Bates number 659.

25 MR. SCHWARTZ: Do you have the Bates number for the

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Tabor - direct

1 notes, your Honor?

2 MR. CHERNOFF: Bates number 155.

3 Q. And so, Mr. Tabor, you've got the tab in front of you, so  
4 I'll just start with the question while we're pulling it up.

5 Is there something here on your notes, Tab 8, Bates  
6 155, that relates to time you billed on April 2nd, 2004?

7 A. All right. If you look at the bottom of the page, I know  
8 there's a reference to March 30, but that was referring to a  
9 memo about something related to March 30, but then there is a  
10 reference to Scott Jaeckel, call with Mark, that's Mark  
11 Silverberg, and Paul, Paul Lowry, of KPMG. If you go to the  
12 next page, I think I list their names again.

13 Q. That is Bates 156?

14 A. Yeah, Mark and Paul, me, and Jaeckel, that's Scott Jaeckel.  
15 And this was -- we then went into issues about tax structure  
16 and getting the asset manager worked out and other things. It  
17 was all structured.

18 Q. And so are you able to fix a date on this call with respect  
19 to the billing records?

20 A. Yes. If you look at the time entry for 4-2, about halfway  
21 down, telephone conference with S. Jaeckel, Mark -- M.  
22 Silverberg and P. Lowry regarding tax structure.

23 Q. And that's P. Lowry, Paul Lowry from KPMG?

24 A. Right.

25 Q. Flip two more pages into note pad two. It's Bates 158 on

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Tabor - direct

1 Tab 9, and on the billing records, if we could bring up Bates  
2 661.

3 And, Mr. Tabor, when you compare your notes to the  
4 billing records, are you able to fix a date on these notes,  
5 this telephone conference, based on what you wrote down?

6 A. Yes. Is the fifth -- 5th of April. Bear with me.

7 Q. What is it you wrote on the notes on the left-hand side  
8 that relates to the time you billed on the 5th of April?

9 A. This, if you look there, the last part of the four, five  
10 entry, "telephone conference with THL people and J. Westra  
11 regarding term sheet and structure memorandum."

12 Q. And does that relate to something you wrote on the notes on  
13 the left-hand side here, 158?

14 A. Yes, I mean, this is a call. It also mentions Paul Lowry  
15 included, in which I don't think I mentioned in my billing  
16 records, but we talked about the structure memo, the blocker  
17 entities, and so forth. This is all tax structure stuff.

18 Q. Let me ask you to turn a few more pages into note pad two,  
19 Page 10, that's Bates number 7 -- 171.

20 MR. CHERNOFF: And then, Mr. Smith, on the billing  
21 records, 662, if we could focus on April 8th. Thank you,  
22 Mr. Smith.

23 A. Okay.

24 (Continued on next page)

Capdcol7

Tabor - direct

1 MR. CHERNOFF: And could we bring up April 8th?

2 Thank you, Mr. Smith.

3 BY MR. CHERNOFF:

4 Q. OK. So, Mr. Tabor, what did you write here in the notes  
5 that you are able to relate to the time you billed Thomas H.  
6 Lee on April 8th?

7 A. These are notes from a telephone conference we had with the  
8 Lee people where they informed us of an intended meeting to  
9 take place and who was going to be present.

10 Q. And who did they tell you was going to be present and how  
11 was that reflected in your notes?

12 A. Well, it said, Bennett, his guys, Sandro O'Neil, which was  
13 a banker, and they mentioned Joseph Collins, Joe.

14 Q. Let me ask you now to -- and, Mr. Smith, could we bring up  
15 on the notes page 663.

16 I will ask you to look at the time you bill on  
17 April 9th.

18 Now, Mr. Tabor, this was the meeting you testified  
19 about in connection with the Letter of Intent that was held in  
20 New York on April 9th?

21 A. Right. The first of the two meetings we had face-to-face.

22 Q. Now, that meeting, as you testified, concerned sort of  
23 big-picture issues?

24 A. That's right.

25 Q. And you didn't take any notes at that meeting, correct?

Capdcol7

Tabor - direct

1 A. I don't believe so. I hadn't seen them.

2 Q. Nothing in this book?

3 A. No. That's correct.

4 Q. And who, again, from the Refco side attended that meeting?

5 A. Mr. Bennett, Mr. Collins.

6 Q. And in the time entry -- and we saw Mr. Collins' notes from  
7 that meeting, correct?

8 A. Correct.

9 Q. In the time entry, though, you only mentioned Mr. Bennett?

10 A. Correct.

11 Q. OK. The last I'll ask you about, sir.

12 A. OK.

13 Q. If you flip further into notepad 2, where you placed a tab

14 12. And that's Bates No. 186.

15 I'll ask that we also bring up on the billing records  
16 Bates 667. And we have it.

17 What on the notes, on the left-hand side of the  
18 screen, relates to the time you billed on April 16, 2004?

19 A. The notes on the left-hand side -- recall, this is the day  
20 after we had had our last meeting on the Letter of Intent, so  
21 we are finalizing the Letter of Intent. And I turned to  
22 preparing a to-do list going forward. The first item is Letter  
23 of Intent signed, and then a bunch of other stuff we needed to  
24 start doing in order to try to complete the transaction once we  
25 signed the Letter of Intent. So this was my beginning of a

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Tabor - direct

1 memo or to-do list on action items.

2 Q. And, again, with reference to the time that you billing on  
3 April 16th, this was the meeting you described where there was  
4 a lot of negotiation and drafting of the Letter of Intent and  
5 you and Mr. Collins stayed after the clients left?

6 A. That was on the 15th, correct. It was the night before  
7 this. So this was the 16th, which was Friday, and we were  
8 finalizing things, but I was also starting to turn my attention  
9 to what we needed to do going forward.

10 So if you look at the last part of the time entry?

11 Q. Yes.

12 A. The work on action items, memorandum for signing documents.

13 So that's what's reflected in these notes in the  
14 left-hand side.

15 Q. OK.

16 A. And for the next several pages -- or next couple of pages,  
17 I guess.

18 Q. It looks like you got, I won't try to read them, but items  
19 1 through 7 on this page?

20 A. On this page, yes.

21 Q. If we can go to the next page, Bates 187, you have 8A and  
22 the letters go through I.

23 A. I think the notes stop on this page.

24 Q. And where, roughly, do they stop with relation --

25 A. At the bottom of the page.

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Tabor - direct

1 Q. OK. And then, Mr. Tabor, there are other notes that follow  
2 before you complete the pages now in notepad 2, which is  
3 Government Exhibit 782?

4 A. Right.

5 Q. OK. Finally, I want to walk up to you Government Exhibits  
6 783, 784, 785 and 786, and, sir, are these the notepads, 3, 4,  
7 5 and 6 that you continued to bill out page by page as you  
8 worked on this transaction?

9 A. Well, yeah, there are clearly four others here, so it looks  
10 like a total of six, and one of them I say "Closing Related;" I  
11 don't have a number on it. But and there is four and five --

12 Q. Let me, just for the record, you were discussing Government  
13 Exhibit 783?

14 A. Right.

15 Then you said three, four, five and six. This one  
16 does not say three. I --

17 Q. 784 is number four?

18 A. Yes. Number four.

19 Q. 785 is number five?

20 A. Correct. And 786 is number six.

21 Q. OK. So we've got, one, two and then an unnumbered one and  
22 four, five and six?

23 A. Correct.

24 Q. Are these all the notepads that you recall filling out,  
25 saving, and producing in connection with your work on the

Capdcol7

Tabor - direct

1 transaction with Refco?

2 A. Yes.

3 MR. CHERNOFF: Your Honor, the government offers 783,  
4 784, 785, 786.

5 MR. SCHWARTZ: No objection.

6 (Government's Exhibits 783 - 786 received in evidence)

7 MR. CHERNOFF: I have no further questions.

8 I thank the Court for staying late

9 THE COURT: And we thank the jurors for staying late.

10 We will break for the night now, ladies and gentlemen.

11 Your coffee will be ready at 9:30.

12 Please follow the normal rules. Don't discuss the  
13 case with anyone. Don't do any research on the case. Take  
14 your notepads and leave your folders.

15 Thank you again for your diligence. I hope you don't  
16 get rained on on the way home. Have a pleasant evening.

17 (Continued on next page)

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1 (Jury not present)

2 THE COURT: Anything else on the record, gents?

3 MR. CHERNOFF: I have a very quick just request to  
4 make without -- maybe Mr. Tabor can be excused.

5 Sir, just step out of the courtroom itself.

6 THE COURT: Mr. Tabor, may I ask you to go into one of  
7 the witness rooms out there just until the jurors go down in  
8 the elevator, please. We promise we won't leave you there.

9 (Witness not present)

10 THE COURT: Won't you be seated, friends.

11 MR. CHERNOFF: Your Honor, I will be very brief.

12 But just during the cross-examination of Mr. Westra  
13 today there were two things that I thought were in  
14 contravention of the understandings we had reached in the  
15 pretrial rules. Mr. Westra was asked whether typically it's  
16 the buyer who prepares the closing binders and typically  
17 whether you see a flow of funds memo or not. We obviously are  
18 supposed to be keeping this to what people did in this deal and  
19 not eliciting expert testimony from fact witnesses who are  
20 lawyers.

21 So I will just ask that the defense be particularly  
22 attentive to that in the cross-examination of Mr. Tabor.

23 MR. SCHWARTZ: I will be particularly attentive to  
24 that during the cross-examination of Mr. Tabor.

25 MR. CHERNOFF: Thank you, Mr. Schwartz.

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1           THE COURT: I would expect nothing else.

2           Anything else?

3           MR. CHERNOFF: No, your Honor. Thank you.

4           THE COURT: Thank you, gents.

5           MR. SCHWARTZ: Your Honor, there is just one issue.

6 It is just a question of timing.

7           THE COURT: Do you want to be on the record?

8           MR. SCHWARTZ: It doesn't matter.

9           THE COURT: Well, then, let me excuse the reporter.

10          MR. SCHWARTZ: Vinny, go home.

11          THE COURT: So there. Thank you.

12          (Discussion off the record)

13          (Adjourned to 10:00 a.m., Friday, October 26, 2012)

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